88-217

No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY AND THE RAILWAY LABOR EXECUTIVES' ASSOCIATION, RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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AUGUST 8, 1988

QUESTIONS PRESENTED

Whether the Commission should be allowed to file this petition, without authorization from the Solicitor General, in a case involving the Commission's orders and affecting its ability to fulfill a Congressionally mandated role, where the court below had authorized the Commission's intervention as a respondent to present its views.

Whether the majority of the court below erred in concluding that the relief accorded did not amount to a collateral attack on the Commission's orders, even though, as a result, the Commission authorized transaction has been effectively enjoined.

Whether the majority of the court below was correct in concluding that it was compelled to hold that the Interstate Commerce Act (ICA) does not supersede the Railway Labor Act (RLA) when necessary to consummate a Commission approved transaction even though the court recognized that its holding would frustrate a program designed by Congress to preserve continued regional and local rail service, because Congress, in making changes in the ICA to promote continuation of regional and local rail service, did not at the same time expressly provide for supersession of, or enact amendments to, the RLA.

If this Court concludes, as we believe it must, that the ICA and the mechanisms for the resolution of labor disputes arising from Commission authorized transactions thereunder, displace the normal dispute resolution mechanisms contained in the RLA, the question presented in No. 87-1589 becomes critical: Whether the court below erred by concluding that the Norris-LaGuardia (NLGA) prevents enjoining a strike which disrupts the ICA's dispute resolution process.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding below were Petitioner, the Interstate Commerce Commission, the Pittsburgh and Lake Erie Railroad Company and the Railway Labor Executives' Association, Respondents.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Interstate Commerce Commission ("Commission") respectfully prays for a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit entered in this proceeding on April 8, 1988.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit is reprinted in the Appendix hereto at App. C, and is reported at 845 F.2d 420 (3d Cir. 1988).[1]

The Opinion of the Third Circuit in the predecessor case, styled as *RLEA v. Pittsburgh and Lake Erie Railroad Co. (P&LE I)* is reprinted in the Appendix

[1] Each item in Petitioner's Appendix ("App.") is individually lettered, pages within are then numbered with the appropriate letter prefix. (*E.g.*, App. A pages are 1a-12a).

hereto at App. D, and is reported at 831 F.2d 1231.[2] The decision of the Interstate Commerce Commission in Ex Parte No. 392 (Sub-No. 1) *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901,* is reprinted in the Appendix at App. F and is reported at 1 I.C.C.2d 810 (1985), *aff'd mem. sub nom. Illinois Commerce Commission v. I.C.C.,* 817 F.2d 145 (D.C. Cir. 1987). The decisions of the Commission authorizing the sale of the P&LE lines are reprinted in the Appendix at App. E.

JURISDICTION

The judgment of the circuit court was entered April 8, 1988. The Commission's time within which to file this petition was extended to August 8, 1988 by order of Mr. Justice Brennan dated July 5, 1988 (App. B). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[2] A Petition for a Writ of Certiorari for review of *P&LE I* was filed with the Court by the Pittsburgh & Lake Erie Railroad Company (P&LE) on March 24, 1988 (S.Ct. No. 87-1589). On April 27, 1988, P&LE filed with the Court a supplemental brief in that proceeding informing the Court of the Third Circuit's decision in the instant case and notifying the Court of P&LE's intention to ask for expedited consideration of the petitions for certiorari in this action as well as the prior Third Circuit decision. The Interstate Commerce Commission was not a party to *P&LE I,* the Third Circuit having expressly limited the Commission's participation in that action to the status of an *amicus curiae.* However, as indicated in our Statement of Questions Presented, *supra,* the Commission believes that the Third Circuit erred in its ruling on the issue of the supercession of the ICA by the Norris-LaGuardia Act and asks this Court to review and reverse the holding of the court in that proceeding based on the decision of this Court in this petition, in No. 87-1888 and in No. 87-1589.

STATUTES INVOLVED

Pertinent provisions of the Interstate Commerce Act, 49 U.S.C. (Supp. V) 10101a, 10505 and 10901, are set forth in App A. This appeal also involves Section 6 of the Railway Labor Act, 45 U.S.C. 156 and Section 4 of the Norris-LaGuardia Act, 29 U.S.C. 104. Each of these statutory provisions is reprinted in the Appendix hereto in App. A.

STATEMENT OF THE CASE

(1) Under Section 10901 of the Interstate Commerce Act (ICA), a non-carrier can acquire and operate a railroad line "only if the Commission finds that the public convenience and necessity require or permit" that it be done. 49 U.S.C. 10901(a). If the Commission finds that the acquisition is within the public interest it may approve the acquisition with such conditions, including labor conditions, as the Commission "finds necessary in the public interest. . . ."[3] 49 U.S.C. 10901(c)(1)(A)(ii).

Under Section 10505 of the ICA, the Commission has the power to exempt rail transportation from the requirements of the Act. Indeed, the Commission "shall exempt" rail transportation "when the Commission finds that the application of a provision of this subtitle. . .is not necessary to carry out the transportation policy of Section 10101a." 49 U.S.C. 10505(a)(1). However, this exemption may be revoked by the Commission, to the extent the Commission finds "is necessary to carry out the transportation policy of Section 10101a."

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[3] *See, e.g., ICC v. Railway Labor Executives' Ass'n*, 315 U.S. 373 (1942); *CMC Real Estate Corp. v. ICC*, 807 F.2d 1025 (D.C. Cir. 1986).

49 U.S.C. 10505(d). The Commission retains its regulatory jurisdiction over the exempt transaction.[4] The Commission may not exercise its authority to relieve a carrier of its obligation to protect the interests of employees. 49 U.S.C. 10505(g).

Following the partial deregulation of the railroad industry by the Staggers Rail Act of 1980, Pub. L. No. 96–448, 94 Stat. 1941-45, a significant change took place in the railroad industry with the creation of numerous short lines and regional railroads through the sale of rail lines to new entrepreneurs.[5] Previously, marginal lines had been abandoned and taken out of service. This healthy trend was assisted by a change in Commission policy. Starting in 1982, the Commission determined that the expense of complying with labor protective conditions imposed on the sale of rail property to new carriers under Section 10901 was hampering shortline development and forcing upon carriers the less attractive to the public interest alternative of abandoning those lines under Section 10903 of the ICA.

As the imposition of labor protections in short line sales to new entrants is within Commission discretion, the Commission began withholding protection in individual applications.[6] After consideration of many

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[4] *See, e.g., UTU v. Norfolk & Western R. Co.*, 822 F.2d 1114 (D.C. Cir. 1987) *cert. denied,* 108 S.Ct. 700 (1988); *G&T Terminal Packaging v. Consolidated Rail Corp.*, 830 F.2d 1230, 1234-1235 (3d Cir. 1987) *cert. denied,* 108 S.Ct. 1291 (1988).

[5] See Finance Docket No. 31205, *FRVR Corporation–Exemption Acquisition and Operation–Certain Lines of Chicago & North Western Transportation Co. Petition for Clarification* (not printed), served January 29, 1988 (*"FRVR"*).

[6] See, *Knox and Kane Railroad Co.-Gettysburg Railroad-Petition for Exemption,* 366 I.C.C. 439 (1982). The Commission's theory on withholding protection was grounded on the premises of (1) the

(footnote continued on next page)

individual applications, the Commission determined that formation of new rail carriers was beneficial and should be encouraged. Therefore, the Commission promulgated the procedures in Ex Parte 392 (Sub-No. 1), *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985). ("Class Exemption") (App. F). There, the Commission exempted rail line sales to new carriers from full compliance with Commission application procedures while retaining authority, under the revocation power, to review and correct any problem arising from the transaction.[7]

The *Class Exemption* established a simplified scheme by which a carrier could apply for an exemption which would be granted seven days after filing unless the Commission notified the parties to the contrary. Any opposition to the exemption may be presented in a petition to revoke the exemption in whole or in part which may be filed with the Commission at any time. The Commission evaluates the petition and may grant whatever remedy it deems appropriate to correct any problem arising out of the transaction. As here pertinent, the Commission's panoply of remedies ranges from partial revocation and imposition of labor protective conditions to the cancellation of the transaction through the ter-

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preservation of rail service, (2) continued service offers the best opportunity for employment for labor, and (3) this process is less cumbersome than abandonment under Section 10903 and sale under Section 10905, use of which achieves the same result as Section 10901.

[7] As the Third Circuit in *P&LE II* acknowledged, the ICC's Class Exemption is consistent with the policies expressed by Congress in the Staggers Act amendments to the ICA (App. C 47a-50a). The Staggers Act expanded the Commission's exemption authority. Further, the Congress directed the Commission to actively pursue exemptions for transportation operations and to review carrier actions after the fact to correct abuses.

mination of the entire exemption. The Commission order disposing of such a petition is reviewable in the Courts of Appeals. 28 U.S.C. 2342.

The Commission's *Class Exemption* procedures and the underlying policy have been successful. New railroad formation has risen each year since 1982 and the miles of lines abandoned by carriers has fallen each year since 1982.[8]

In formulating the *Class Exemption,* the Commission rejected RLEA's demand that labor protections be imposed on all 10901 transactions. A petition by RLEA to review the *Class Exemption* was denied. See *Illinois Commerce Commission v. ICC,* 817 F.2d 145 (D.C. Cir. 1987)(*mem.*).

(2) This case arose out of Pittsburgh & Lake Erie Railroad Co.'s (P&LE's) agreement to sell all of its lines to a non-carrier, "P&LE Railco", pursuant to Section 10901 and the *Class Exemption* procedures. After being informed of the proposed sale, P&LE's unions served a notice under Section 6 of the Railway Labor Act (RLA), 45 USC 156, proposing changes to their collective bargaining agreements with P&LE. Notice of the proposed transaction was filed with the Commission on September 19, 1987. The Commission denied an RLEA request for a stay of the effectiveness of the exemption and as a result the Commission's authorization became effective on September 26, 1987. An RLEA petition to revoke the exemption is pending before the agency. RLEA also filed with the district court below (United States District Court for the Western District of Pennsylvania) a complaint requesting an injunction against the sale until P&LE exhausted the procedures of the RLA, relating to collective bargaining over the carrier's decision to sell and over the effects of the sale on the employees. P&LE replied that as the sale is under the

[8] See *FRVR, supra.*

exclusive and plenary jurisdiction of the ICA, RLA procedures have no place in the decision to sell or in the protections afforded employees of the affected rail carrier. On September 15, 1987, the P&LE was struck by its unions.

On October 8, 1987, the district court enjoined the strike. The trial judge held that the strike was intended to negate the Commission's determination that employee protections should not be required in 10901 transactions; that the ICA relieved the P&LE of any duty to bargain with the unions that might exist under RLA; and that Section 4 of the Norris-LaGuardia Act, 29 U.S.C. 104, must be accommodated to the purpose of the ICA and to the jurisdiction of the Commission to determine what employee protections should be required in 10901 sale transactions. On October 26, 1987, in what has come to be known as "*P&LE I*", the Third Circuit summarily reversed the District Court on the issue of whether the court below had jurisdiction to enter an injunction against the strike. In the Third Circuit's view the ICA is not a labor statute and thus not a statute "to which the Norris-LaGuardia Act must be accommodated." 831 F.2d at 1240. The court remanded the case to the District Court. (App. D-98a).

On remand the District Court rejected the argument that the ICA granted exclusive jurisdiction over rail carrier transactions to the Commission and that jurisdiction preempted the carrier's duty under the RLA to bargain with the unions over the sale and the effects of the sale. The District Court concluded that the ICA does not relieve the carrier of this duty. The court enjoined the sale until the carrier exhausted the bargaining procedures of the RLA to change existing collective bargaining agreements or the purchaser agreed to adopt them. (App. C-29a).

P&LE, joined by the Commission as Intervenor, (App. C-50a) appealed this judgment to the Third Circuit. On April 8, 1988, that court rendered the decision known as "*P&LE II*" which is the subject of this petition. The court, in a 2-1 decision, affirmed the district court. The majority of the court rejected the argument that the ICA supersedes the RLA in those transactions in which RLA acts as an obstacle to the consummation of a Commission authorized transaction. (App. C-58a-71a). The majority of the Court indicated, over the vehement dissent of one member (App. C-76a), that even though the effect of its decision was to halt the Commission authorized transaction it did not view the request for relief to be a collateral attack on the Commission's orders. (App. C-50a-58a). While admitting that its holding would "disrupt", perhaps irreparably, the program intended by Congress to insure continuation of local and regional rail service (App. C-50a), the majority of the court below felt compelled to hold the RLA dispute resolution procedures applicable to the sale of P&LE (App. C-19a), because Congress in establishing the program did not explicitly amend the RLA to modify the mandatory bargaining process in connection with Commission authorization of rail line dispositions.

PRELIMINARY STATEMENT CONCERNING COMMISSION AUTHORITY TO SEEK THE WRIT

The Solicitor General, by letter dated June 14, 1988, has advised the Court that he has determined the Interstate Commerce Commission is not "properly a party respondent" and that he has not authorized the filing of a responsive brief in this case. We take his statement to include lack of authorization to file this petition for writ of certiorari. His position, as we understand it from oral advice, is that Commission intervention in the pro-

ceeding below to defend against collateral attack on the *Class Exemption* procedures[9] and premature judicial intrusion upon a proceeding then pending before the agency[10] was improper even though intervention has been expressly authorized by the court below, and hence did not confer upon the Commission party status. We do not understand the Solicitor General to contend that even if the Commission were a proper party below he would have the right to limit Commission access to this Court; hence we do not address this issue except to the extent that the ICA, its legislative history, and precedent establishing that right, also addresses the issue of the Commission's independent litigating authority in general.

The Commission has had, virtually since its creation, the independent authority to litigate before this Court and in the lower courts in defense of its orders. This authority was granted to the Commission by Congress in the Urgent Deficiencies and Appropriations Act of 1913, 38 Stat. 220 (1913) and has been upheld by this Court in a series of decisions commencing with *ICC v. Oregon–Washington Rail Co.*, 288 U.S. 14 (1933).[11]

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[9] Ex Parte No. 392 (Sub-No. 1), *Class Exemption For The Acquisition And Operation Of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985). (App. F).

[10] Finance Docket No. 31121, *P&LE Railco. Inc.–Exemption–Lines Of The Pittsburgh & Lake Erie Railroad Company And The Youngstown And Southern Railway Company;* Finance Docket No. 31122, *Chicago West Pullman Corp.–Continuance In Control Exemption–P&LE Railco, Inc.–Control Exemption–The Pittsburgh, Chartiers And Youghiogheny Railway Co.;* Finance Docket No. 31126, *Railway Labor Executives' Association v. Pittsburgh & Lake Erie Railroad Co., et al.*

[11] Even before the passage of the Urgent Deficiencies and Appropriations Act the practice had developed by which the Attorney General acquiesced in both the ICC and FTC's arguing their own cases before this Court. With respect to the ICC this practice was codified in 1913 and reaffirmed by the Judges Act of 1925, 43 Stat.
(footnote continued on next page)

The Commission's independent litigating authority is broad. It is embodied, in part, in 28 U.S.C. 2323, which states that the Commission may appear as a party on its own motion and as of right, represented by its own counsel, in "*any* action *involving* a Commission order." (Emphasis added). This authority also allows the Commission to pursue a case to this Court if necessary without the requirement of joinder by the Solicitor General and without his acquiescence in the Commission's filing a brief. 28 U.S.C. 2348, 2350. See, Stern, *"Inconsistency" in Government Litigation,* 64 Harv. L. Rev. 759 (1951), ("*Stern*"), cited with apparent approval in *United States v. Providence Journal Co.*, 56 U.S.L.W. 4366, 4370 n.9. (U.S. May 2, 1988).

That Congress intended the Commission to be an independent litigant is clear when it is realized that the Commission's grant of litigating authority was given it by Congress *after* the Act establishing the Department of Justice gave the Attorney General supervision over "the several Departmental solicitors. . . district attorneys and any outside counsel employed on behalf of the United States." Bell, *The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?*, 46 Fordham Law Review 1049 (1978), ("*Bell*") citing Act of June 22, 1870, ch. 150 §§ 3, 15-16, 16 Stat. 162, 164 (corresponds to 28 U.S.C. §§ 518-519, 543 (1970)).

The Commission's authority to litigate on its own has remained intact to this day. MacIntyre, *The Status of Regulatory Independence,* 1969-1970 Federal Bar Journal, at 1. Indeed, Commission concerns about the effect on its litigating authority of then pending legislation (S. 663) to bring review of Commission orders under the Judicial Review Act of 1950, 28 U.S.C. 2341, *et seq.* (also

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936; MacIntyre, *The Status of Regulatory Independence,* 1669-1970 Federal Bar Journal at 7.

called the Administrative Orders Review Act) (the Hobbs Act) were a major consideration of Congress in the debate on the legislation to substitute Hobbs Act review for Urgent Deficiencies Act review of ICC orders. H. Rep. No. 93-1569, 93d Cong. 1st Sess. (1974), reprinted in [1974] U.S. Code Cong. & Admin. News 7025. *See also, Hearing on S. 663, United States Senate, Subcommittee on Improvements in Judicial Machinery, Committee on the Judiciary,* 93rd Cong., 1st Sess. (1973) (*Hearing*).[12]

To alleviate these problems the Congress asked for and received assurances from the Department of Justice and the Solicitor General that the passage of S. 663 would not truncate the Commission's ability to participate independently in actions involving its orders. *Hearing,* supra at 32. Specifically, then Solicitor General Bork stated that "the Commission would continue to have the same authority to represent itself independently in the Supreme Court under S. 663 that it now has under the Urgent Deficiencies Act. That authority includes the right to file petitions for certiorari and to oppose such petitions when filed against it." H. Rep. No. 93-1569, 93d Cong., 1st Sess. 10-12 (1974).[13]

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[12] During this Congressional Inquiry the Commission's Chairman cited several cases in which the ICC and Solicitor General disagreed as to position and the Commission filed with this Court separately: *Louisville & Nashville R.R. Co. v. U.S.,* 392 U.S. 571 (1968); *United States v. United States and ICC* (Northern Lines Merger Case), 396 U.S. 49 (1970); and a case where a Department of Justice client agency opposed the Commission position causing the Commission to file separately for review by this Court, *Atchinson, T. & S.F. Ry. Co. v. Wichita Board of Trade,* 412 U.S. 800 (1973).

[13] In hearings on the bill in the House of Representatives that body made it equally clear that the Commission was to retain its independence in litigation. *Hearings, Judicial Review of the In-*

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Based on these assurances the Senate Committee stated that it agreed with the opinion of the Solicitor General that the Commission would "continue to have the opportunity to present its views independently and intends that the bill have this effect." S. Rep. 93-500, 93d Cong., 1st Sess. 7 (1973). The House Committee, after restating the Commission's concerns, concluded (Emphasis added):

> Objectively, it is difficult to perceive what more the Congress may do legislatively to protect the rights of the ICC and aggrieved parties to be shielded from possible caprice without squandering the primary intent of this legislation. The ICC may still intervene at any level as a matter of right and be represented by its counsel; the Attorney General may not terminate a proceeding over their objection; *they may initiate, take part in or continue proceedings without regard to the action or inaction of the Attorney General; and they may file a petition for writ of certiorari if they so choose.* 28 U.S.C. §§ 2348, 2350. The intent and meaning of the above provisions could not be stated with more clarity; the Committee is compelled to conclude that any such activity on the part of the Attorney General, resulting in an abridgement of any of those statutorily-conferred rights and whether witting or unwitting, would be subject to challenge in court. Moreover, the ICC has twice received the assurance of the Department, through the Solicitor General and the Assistant Attorney General for Legislative Affairs (see Letters attached to this

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terstate Commerce Commission, Subcommittee on Crime of the Committee on the Judiciary, 93d Cong. 1st Sess., December 10, (1974). See particularly pgs. 22-23.

> Report), that the independence of the Commission with respect to its ability to participate fully and equally in all proceedings affecting its interests will not be tampered with in any respect.

H. Rep. No. 93-1569, 93d Cong., 1st Sess. 9 (1974). Thus, there is little room for argument. Congress clearly intends that the Commission continue to enjoy its independent authority to litigate.

The position adopted by the Solicitor General in challenging the Commission's participation in this case and the Commission's litigation authority in general is not only wrong but raises grave issues with respect to the doctrine of separation of powers.

The Congress intended the Commission to be independent of the Executive branch. That independence extends to the Commission's independence from the Department of Justice in legal matters, including litigation. *Bell, supra* at 1058. The reasons for the independence of the Commission's litigating authority are identical with the traditional reasons for the Commission's independence generally. The Commission was meant to be free of Executive branch control. It is an administrative body created to carry into effect legislative policies embodied in the statute. Its duties are performed "without executive leave and . . . must be free of executive control." *Humphrey's Executor v. United States*, 295 U.S. 602, 628 (1935). *See also, Senate Report: Separation of Powers and the Independent Agencies: Cases and Selected Readings*, S. Doc. No. 91-49, 91st Cong., 1st Sess. (1970); and *Weiner v. United States*, 357 U.S. 349, 356 (1958) (President could not remove Commissioner without cause even where Commission's enabling statute included no specific removal restriction).

If the Executive branch controlled the agency it could jeopardize the agency's impartiality in carrying out its functions. Verkiul, *The Status of Independent Agencies After Bowsher v. Synar,* 1986 Duke L.J., 779 at 782.

It follows that the Commission's litigation authority must be isolated from control by the Executive. If that were not so the result Congress most feared, Executive branch control of the Commission, could be attained through limiting the Commission's ability to defend its orders. The Department of Justice need only refuse to defend Commission orders to control, in a real sense, the Commission's function and nature. See the dissent of Judge Brown in *ICC v. Southern Ry. Co.,* 551 F.2d 95, 96 (5th Cir. 1977) (*en banc*). The Commission's ability to defend its orders and to present its position in pending litigation is a part of its status as an independent agency. Without such ability it loses its independence. *MacIntyre, supra* at 8.

The Commission's litigating authority extends of necessity to collateral attacks upon Commission orders of the character mounted by RLEA in this case.[14] This is so for two reasons. First, as stated above, 28 U.S.C. 2323 grants the Commission the authority to appear on its own motion in any action *involving a Commission order.* Indeed, the legislative history makes clear that this independent litigating authority extends beyond direct defense of orders by stating a right to "initiate" proceedings without action or inaction by the Attorney General. H. Rep. No. 93-1569, 93d Cong., 1st Sess. 9

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[14] The fact that the sharply divided court below devoted so much of its opinions to the issue of whether RLEA's actions constituted a collateral attack on the Commission's orders demonstrates the correctness of the Commission's court authorized intervention to be heard on that issue.

(1974). Second, the denial of Commission authority to appear in cases collaterally attacking Commission orders could lead to evasion of direct review by parties to Commission proceedings and prevent the Commission's defense of its position where executive branch policy is contrary to Commission policy. Such a result is unacceptable under *Humphrey's Executor,* 295 U.S. at 624; this Court's more recent decision on this subject in *Morrison v. Olson,* No. 87-1279 (U.S. June 29, 1988), slip op. 28-34; and the Congressional will as expressed in the debate over changing the process for judicial review of Commission orders. H. Rep. No. 93-1569, *supra.*

Finally, the recent opinion of this Court in *United States v. Providence Journal Company, supra,* does not foreclose but, rather, supports the Commission's position that it has independent authority to appear before this Court. As this Court recognized in *Providence Journal* there are exemptions from 28 U.S.C. 518, which grants the Attorney General and Solicitor General the power to conduct and argue suits in this Court. *Id.* at 4368. The Commission's litigation authority is one such exemption. *Id.* at 4370 n.9 citing *Stern, supra.*

Moreover, none of the policies that the Court has pointed to on occasion as supporting the Solicitor General and Attorney General's exclusive conduct of litigation in this Court are present here. *See, e.g., Id.,* at 4370. There is no conflict among government agencies regarding the Commission's position on its authority over rail line sales under 49 U.S.C. 10901 and the effect of a Commission order authorizing such a transaction upon other laws. Thus, there is no need for the Solicitor General to harmonize conflicting Government petitions urging inconsistent positions. Even assuming that the

Solicitor General had the requisite power over this agency's litigation to make a choice, the choice before this Court is not which agency's position should be heard but whether *any* position will be heard from the agency responsible for oversight of the nation's rail transportation system.

This is not a case where the Commission is attempting to assert a governmental interest consigned to the Department of Justice, such as disagreements over the interpretation of the antitrust laws which the Department is charged with enforcing. *Stern*, at 763, citing *McLean Trucking Co. v. United States*, 321 U.S. 67 (1944).[15]

Finally, the Court has before it the petition of the railroad and responses by rail labor and various interest groups, so there is no need for an independent estimate by the Solicitor General as to whether the issues presented are of sufficient importance to warrant engaging this Court's attention by the filing of a petition for a writ of certiorari. The one thing all parties agree on is the paramount importance of a resolution by this Court during its October, 1988 Term of the issues presented in this petition and in No. 87-1589. All of the parties can be expected to participate actively in the proceeding on the merits if this Court decides to undertake review. The only party that would not be heard, if the Court heeds the Solicitor General's plea against the Commission, is the party whose order permitting the sale is being frustrated and whose ability to implement

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[15] Even in such cases the Court has routinely heard from the Commission. *See, e.g., United States v. ICC, supra.* The agency should be permitted to make its position known to the Court where as here the views of the United States have been solicited and there is reason to believe those views may differ from the Commission's.

the Congressionally mandated program for the revitalization of the nation's regional railroad system is being blocked. In these circumstances it is vital that this Court accept the Commission's petition for writ of certiorari for filing so that the Court will have available to it the views of the agency charged with administering the statutory scheme at issue. Such a result is dictated, we submit, by the numerous recent decisions by this Court collected in Mr. Justice Scalia's concurring opinion in *Mississippi Power & Light Co. v. Mississippi*, 56 U.S.L.W. 4751, 4758 (U.S. June 24, 1988) setting forth the deference to be accorded an agency's statutory interpretation under such circumstances.

REASONS FOR GRANTING THE WRIT

As the Commission explained in its memorandum urging deferral of the decision on whether to grant certiorari in response to the petition in No. 87-1888 and its precursor No. 87-1589, these petitions do not present the best vehicle for resolving the regulatory and labor relations issues presented by these and numerous other proceedings brought to the Court's attention in the closing days of its 1987 term. However, petitions concerning these two cases are before the court and in combination they present the two most contentious and confused (at least following issuance of the decision below) issues in labor management relations in the rail industry today: the effect of Commission authorization of a transaction upon (1) labor's and management's RLA obligations to bargain over changes in working conditions and (2) labor's right to strike in the face of ICA mandated or Commission imposed dispute resolution procedures. Because a proper resolution of these issues by this

Court during its October, 1988 Term is of quintessential importance to the continuing revitalization of the rail industry and the Commission's supervision of consolidations, sales and other dispositions of rail assets within that industry we feel constrained to file this petition. However, as expressed in our memorandum of June 23, 1988 in No. 87-1888, it is our hope that a better vehicle for resolution of these issues will be subsequently presented to this Court in time to permit the substitution of that case for this case for plenary consideration and decision by this Court during its October, 1988 Term.[16]

Not only did the court below decide issues of enormous significance but it did so in a manner that is at odds with the seminal decisions of this Court and of other United States Circuit Courts of Appeals concerning the Commission's role in supervising labor relations in the rail industry.

1. This case is of exceptional importance for several reasons. First, if the court of appeals decision is allowed to stand it will, as acknowledged by the majority, "disrupt" a program approved by Congress and designed to rebuild and improve regional rail service where possible. (App. C-50a). The rail line sales program and formation of new rail carriers has been of unquestioned benefit to the nation. The number of new rail carriers has increased from 25 in 1982, 31 in 1984, 45 in 1986 to 70 in 1987. In the same time period the number of rail line miles abandoned has decreased from 5151 to a low of 1932 in the past year. More importantly, instead of the painful process of abandonment of rail

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[16] *Burlington Northern Railroad Company v. United Transportation Union,* Nos. 87-2581 and 87-2600 (8th Cir. May 31, 1988); petition for rehearing and suggestion for rehearing *en banc* filed June 14, 1988. (*BN-MRL*).

lines, which normally entails the permanent loss of railroad service and jobs, the formation of these new carriers provides service for local economies and additional traffic to larger carriers, plus new employment opportunities on both the regional and trunk carriers. *FRVR, supra.* Thus, new railroad formations generated by the *Class Exemption* procedures have had a salutory effect on railroad transportation service, the level of rail labor employment and the maintenance of a sound rail transportation system. Carrying out this Congressionally approved program is a key goal of the Commission which is now blocked by the decision of the Third Circuit.[17]

As it now stands, a Commission determination that labor protections are not in the public interest in a particular transaction will have no force or effect. Labor may circumvent the ruling by invoking the RLA and importuning a court to grant it the relief the agency has denied, or, losing before both court and agency, may simply strike thereby vetoing the transaction authorized by the Commission as in the public interest. This result renders the Commission's determination a nullity and grants rail labor a veto over any rail transaction.

That rail labor seeks a veto over all rail transactions and not just those arising out of transactions governed by the Commission's decision in the *Class Exemption* is clear from the RLEA's petition to the United States Court of Appeals for the District of Columbia Circuit to review the order of the Commission approved merger of the Union Pacific Corporation (UP) with the Missouri-Kansas-Texas Railroad Company (MKT) in Finance

[17] See, Stopped in their Tracks, Forbes Magazine, May 30, 1988 at 11.

Docket No. 30800, et al., *Union Pacific Corporation, Union Pacific Railroad Company and Missouri-Pacific Railroad Company–Control–Missouri-Kansas-Texas Railroad Company, et al.*, (served May 19, 1988). In the petition for review, styled as *RLEA v. ICC*, No. 88-1391 (D.C. Cir. filed May 27, 1988), (App. K), RLEA seeks a judicial determination based on the decision of the court below that even the Commission's approval of a transaction under 49 U.S.C. 11343 has no effect on labor's rights to demand negotiations under RLA procedures, decisions of this Court and other United States Circuit Courts of Appeals to the contrary notwithstanding. See also *Railway Labor Executives Ass'n v. Guilford Transportation Industries*, petition for writ of certiorari pending, No. 87-1911 filed May 23, 1988, in which the RLEA seeks to have this Court overturn a contrary determination by the United States Circuit Circuit Court of Appeals for the First Circuit. (App. I).

In rail labor's view then, its interests, as determined by it, trump the public interest as determined by the Commission in any rail transaction; a result that Congress could not have intended. See, *Missouri Pacific R. Co. v. United Transportation Union*, 580 F. Supp. 1490 (E.D. Mo. 1984), *aff'd*, 782 F.2d 107 (8th Cir. 1986) *cert. denied*, 107 S.Ct. 3209 (1987) ("*MoPac*") and Judge Fagg's dissent in *Burlington Northern Railroad Co. v. United Transportation Union*, Nos. 87-2581 and 87-2600 (8th Cir. May 31, 1988) ("*BN-MRL*") (App. G.)

2. This Court has on numerous occasions ruled on the exclusive and plenary nature of the Commission's jurisdiction over consolidations, sales and other dispositions of rail assets in the rail industry. In *Transit Commission v. United States*, 289 U.S. 121 (1933) this Court found that Section 1(18) of the ICA required Commis-

sion approval of any extension of an interstate carrier's rail line. Section 1(18) was later recodified and line sales and extensions are now regulated under Section 10901, the section at issue here.

Permanent cessations of service which were also regulated under Section 1(18) are presently regulated under Section 10903. With respect to that provision this Court has found that the Commission's exclusive jurisdiction preempted other laws that were obstacles to the Commission's authority despite the absence of an express statutory preemption provision. *Chicago & North Western Transportation Co. v. Kalo Brick and Tile Co.*, 450 U.S. 311 (1981) (*Kalo Brick*). As this Court recognized in *Kalo Brick* this authority is granted to the Commission by Congress as a part of regulatory framework to ensure a rail transportation system in the public interest. *Id.* at 320. Finally, in *Schwabacher v. United States*, 334 U.S. 182 (1948), this Court held that the Commission's authority over mergers of rail carriers is exclusive and plenary.

This jurisdiction, of necessity, extends to oversight of labor management relations to the extent necessary to ensure that realization of the public benefits associated with the transaction authorized by the Commission as consistent with the public interest are not frustrated. In *United States v. Lowden*, 308 U.S. 225 (1939), this Court approved the Commission's authority to impose on rail transactions conditions designed to resolve labor disputes arising out of the transaction, over the objection of rail management and prior to that authority having been explicitly granted the Commission. In *ICC v. Railway Labor Executives' Association*, 315 U.S. 373 (1942), this Court also upheld the Commission's authority to impose labor conditions on abandonments. In a

concurring opinion authored by Mr. Justice Stevens and joined by three other Justices in *Brotherhood of Locomotive Engineers v. ICC*, ____ U.S. ____, 107 S.Ct. 2360 (1987); it was agreed that Commission authorization of a consolidation pursuant to 49 U.S.C. 11343 is effective against any and all other statutes that would serve as an impediment to its implementation, including the RLA, to the extent that RLA would impose an obligation to bargain over matters disposed of by the Commission's order.

The decision below conflicts with the decisions of this Court upholding the Commission's exclusive and plenary authority over consolidations, sales and other dispositions of rail assets in the rail industry and establishing the Commission's authority and obligation to resolve labor management disputes arising out of Commission authorization of such transactions See *Norfolk & Western Ry. Co. v. Nemitz*, 404 U.S. 37 (1971) and discussion of *MoPac, infra*, p. 23.

3. With the single exception of the Third Circuit[18] the United States Courts of Appeals are uniform in the view, shared by the Commission, that a necessary component of this regulatory framework includes the authority of the Commission to supersede other laws, including the otherwise applicable RLA, where those

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[18] A recent decision in the Fifth circuit, in a proceeding in which the Commission did not participate, purports to follow and apply the decision of the Third circuit in *P&LE II. Railway Labor Executives' Ass'n v. City of Galveston, Texas, acting by and through the Board of Trustees of the Galveston Wharves*, No. 87-6169 (5th Cir. June 23, 1988) ("*Galveston Wharves*"). To the extent it does so the Commission believes the case was wrongly decided.

laws stand as obstacles to the consummation of a Commission authorized transaction. See *Brotherhood of Locomotive Engineers v. Boston & Maine Corp.*, 788 F.2d 724 (1st Cir.), *cert. denied,* 107 S.Ct 111 (1986).

The scope of the Commission's authority is best summed in the Eighth Circuit's decision in *MoPac,* (*supra*). There the court held that where the Commission had approved a transaction the ICA exempted the railroads involved from the mandatory bargaining requirements of the RLA and a strike called to obtain rights not contemplated by the Commission's order of approval could be enjoined.

Moreover, the Third Circuit's view is directly contrary to two recent Eighth Circuit decisions, *Railway Labor Executives' Association v. Chicago and North Western Transportation Company, et al.,* No. 87-5071 (8th Cir., May 31, 1988) (App. H), petition for writ of certiorari pending, No. 87-2049 (filed June 14, 1988), and *BN-MRL, supra,* petitions for rehearing *en banc* pending. (App. G). In both decisions the Eighth Circuit held that the ICA provided the Commission with superseding authority to "supervise and implement labor protective conditions in terms of acquisitions, sales, and abandonments of railroad lines." This holding is in direct conflict with the holding of the Third Circuit which rejected the view that the ICA superseded the RLA.[19] In both the Third and Eighth Circuit cases the Commission authorized the sale of rail lines pursuant to 49 U.S.C. 10901. Thereafter rail labor sought to block the sales by

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[19] Other Circuits have likewise taken the view that the ICA supersedes the RLA. See *Burlington Northern Ry. Co. v. ARSA,* 503 F.2d 58 (7th Cir. 1974) *cert. denied,* 421 U.S. 975 (1975); and *RLEA v. Staten Island R.R.,* 792 F.2d 7 (2d Cir. 1986), *cert. denied,* 107 S.Ct. 927 (1987). Also in accord is RLEA v. Chicago & N.W. Transportation Co., 124 L.R.R.M. 2715 (D.Minn. 1987).

charging the rail carriers with violations of the RLA for the carrier's failure to bargain over the sale. In the Eighth Circuit the court denied rail labor the relief it sought.[20] The confusion and the conflict created in the Circuits by the erroneous decision of the court below argues strongly in favor of review by this Court.

4. The *P&LE II* decision is grounded in the mistaken notion that the ICA is not a labor statute and if Congress had wanted the provisions of the RLA not to apply to Section 10901 transactions it would have amended the RLA to so provide (App. C-47a). This error undermines the Commission's ability to administer its statute and perform its duties. What is missing from the *P&LE II* court's delibertions are (1) a realization that for fifty years the RLA has not been applicable to rail transactions committed to the regulatory oversight of the Commission and (2) a recognition that Congress, when it deemed some modification to the protections afforded rail labor necessary amended the ICA not the RLA.

The ICA is a labor statute. For the last fifty years it has functioned as such with respect to rail transactions committed to the regulatory oversight of the Commission. The Commission's authority in this area has been upheld by this Court in an unbroken line of cases. Commencing with *United States v. Lowden, supra;* and *ICC v. RLEA, supra.*

In addition since 1936, and the adoption of the Washington Job Protection Agreement (WJPA), rail labor and rail management have conducted their affairs

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[20] In *BN-MRL* a majority of the panel, over the vigorous dissent of one member, also held that the ICA does not supersede the NLGA except in circumstances where an express preemption provision of the ICA such as 49 U.S.C. 11341 is available. In our view this holding is erroneous and is presently the subject of a Commission request for rehearing *en banc* before the Eighth Circuit.

in a manner consistent with the agreed understanding that the Commission is the sole arbiter of rail labor disputes that arise out of transactions approved by the Commission. The WJPA mandated binding arbitration of labor issues permitting prompt consummation of the transaction. Speedy, mandatory arbitration (outside the RLA) allowing railroads to change the status quo by completing the merger, sale or transfer, and to achieve the benefits of the agreed upon transaction, has been the norm since that time. See *New York Dock Ry. Co. v. ICC,* 609 F.2d 82, 86-90 (2d Cir. 1979); and Finance Docket No. 30532, *Maine Central Railroad Company-Georgia Pacific Corporation, Canadian Pacific Ltd. and Springfield Terminal Railway Company-Exemption from 49 U.S.C. 11342 and 11343* (1985), *aff'd mem. sub nom. RLEA v. ICC,* 812 F.2d 1443 (D.C. Cir. 1987).

Congress has amended the ICA several times to provide the Commission with direction and guidance in its resolution of rail labor disputes. The Transportation Act of 1940, Pub. L. No. 785, Ch. 722, 54 Stat. 898, amended the ICA to authorize employee protections as a condition of the Commission's approval of consolidations. (In effect the Congress adopted the compromise designating the Commission as the arbiter of rail labor disputes).

In the Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 985 ("3R Act"), the Congress gave consideration to the rail industry and its needs. Congress enacted the 3R Act with one purpose, the reorganization of regional railroads into an economically viable system capable of providing adequate and efficient rail service. 3R Act, Section 101(b)(2) and (5). The Commission was given its customary role of overseeing the revitalization of the regional rail system. In order to aid the reorganization overseen by the Commission,

Congress enacted a scheme which made it easier for a rail carrier to abandon unprofitable lines. See. S. Rep. No. 93-601, 93d Cong., 1st Sess. (1973), reprinted in [1973] U.S. Code & Cong. Admin. News 3275. However, in order to alleviate the possible harmful effects of abandonments on rail labor, the Congress also mandated benefits and protections for employees affected by terminations of service. These benefits included displacement, separation, and moving allowances. *Id.*

Shortly thereafter Congress engaged in a broader discussion of labor protections for rail employees and rail transportation issues in general. In the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 128 (1976) ("4R Act") Congress required the ICC to impose protective conditions on rail transactions involving mergers, trackage rights or leases. (For a brief history of the Commission's authority and expertise in rail labor matters, see *New York Dock Railway Company v. ICC,* 609 F.2d 83, 86-90 (2d Cir. 1979), and *RLEA v. United States,* 675 F.2d 1248 (D.C. Cir. 1982)). The 4R Act also amended the ICA to make the imposition of labor protective conditions in abandonments mandatory rather than discretionary. Pub. L. No. 94-210, § 802 (1976) (amending 49 U.S.C. § 1a(4)), recodified at 49 U.S.C. § 10903(b)(2). See also, *Oregon Short Line Railroad and the Union Pacific Railroad Co.-Abandonment-Portion Goshen Branch,* 354 I.C.C. 76 (1977), *modified,* 354 I.C.C. 584 (1978), *modified,* 360 I.C.C. 91 (1976). In the 1976 4R Act the Commission was assigned the responsibility for determining the level of labor protective provisions in several categories of transactions. See *New York Dock Railway-Control-Brooklyn Eastern District Terminal,* 354 I.C.C. 399 (1978), *modified,* 360 I.C.C. 60, (1979); *aff'd, New York Dock, supra; RLEA v. United States,*

supra. In addition, in that Act, Congress established a national rail transportation policy that charged the Commission with the responsibility of, *inter alia*, encouraging fair wages and suitable working conditions for rail labor, 49 U.S.C. 10101a(12).

Finally, the Staggers Rail Act, *supra*, made labor protective conditions mandatory in connection with the abolition of rate bureaus (Section 219(g)) and feeder line sales (Section 401, adding 49 U.S.C. 10910(j)) and prohibited labor protections on Section 10905 sales, (49 U.S.C. 10905, *Railway Labor Executives Ass'n v. United States*, 791 F.2d 994 (2d Cir. 1986)). The Act also gave the Commission the discretion to impose protective conditions on reciprocal switching agreements (49 U.S.C. 11103(c)(2)) and on the construction of new rail lines (49 U.S.C. 10901(e)).

This recitation of the Commission's rail labor functions and authority refutes the holding of the Third Circuit that the Commission has no "expertise" in rail labor disputes (App. C-65a) and its assertion that it is "unlikely that the Congress would rely on the Commission as the sole arbiter of rail labor protections." (App. C-62a). That is precisely what the Congress has done. Since at least this Court's decision in *United States v. Lowden*, *supra*, the Congress has relied on the Commission to determine the level of labor protections appropriate for rail employees and to supervise the implementation of those protections. *Norfolk & Western Ry. Co. v. Nemitz*, *supra*. For fifty years the Commission, with the guidance of the Congress, not the RLA, has determined whether and to what extent labor protections would be provided in various rail transactions. Thus, the ICA is a labor statute to the extent that it authorizes and requires the Commission to resolve labor disputes arising out of rail transactions whose approval is committed by

Congress to the regulatory supervision of the Commission.

5. If this Court agrees that the ICA procedures should be deemed to supersede RLA procedures with respect to effecting changes in working conditions associated with Commission authorized transactions, resolution of the NLGA issue presented in No. 87-1589 becomes crucial. The dispute resolution mechanism in the *Class Exemption* is akin to those found in the RLA. This Court has held that, notwithstanding the express provision of NLGA prohibiting enjoining strikes, federal courts may enjoin strikes in order to protect the dispute resolution procedures established to resolve labor disputes under the RLA. See *Brotherhood of R.R. Trainmen v. Chicago River and Indiana R.R.*, 352 U.S. 30 (1957) and *Boys Markets, Inc. v. Retail Clerk's Union*, 398 U.S. 235 (1970). We submit that no principled basis can be shown for arriving at a contrary result where a threatened strike subverts the dispute resolution processes of the ICA when those processes have been held to substitute for those of the RLA.

Under the *Class Exemption* procedures rail labor may attempt to demonstrate that labor protective conditions are required within the context of a petition for revocation of the exemption. The Commission may grant conditions, terminate the transaction or cancel the exemption in response to the petition. Moreover, any determination by the Commission with respect to the petition is reviewable by the Courts of Appeals. 28 U.S.C. 2342. The *Class Exemption* procedures provide the mechanisms and the ICA the authority to resolve any rail labor dispute arising out of ICC authorization of line sale transactions.

6. Even if the Court does not agree that the ICA supersedes the RLA, the decision of the court below was in error and should be overturned. Commission author-

ization of a transaction eliminates any duty to bargain under RLA a rail carrier party to the transaction would otherwise have. The Commission determines what, if any, labor conditions will be placed on its authorization of a rail transaction. Once the carrier accepts these conditions by consummating the authorized transaction there is nothing for labor and management to bargain over. *MoPac, supra*, 580 F. Supp. at 1490; *International Ass'n of Machinists and Aerospace Workers v. Northeast Airlines Inc.*, 473 F.2d 549 (1st Cir.), *cert. denied*, 409 U.S. 845 (1972). *See also American Airlines, Inc. v. CAB*, 445 F.2d 891 (1st Cir. 1971), *cert. denied*, 92 S.Ct. 674 (1972) (RLA procedures not available for disputes arising out of transactions which pertain to subjects covered by Board's labor order). Without a right to negotiate RLA procedures cannot be invoked to enjoin a transaction allegedly in violation of RLA and a strike to vindicate a purported right that does not exist can be enjoined.[21]

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[21] We recognize that an alternate argument concerning lack of obligation to bargain under the RLA can be and has been made based on this Court's decision in *Textile Workers' Union v. Darlington Manufacturing Co.*, 380 U.S. 263 (1965). (See also, *Air Line Pilots Ass'n v. Transamerica Airlines, Inc.*, 123 L.R.R.M. 2682 (E.D.N.Y. 1986), *appeal dism'd*, No. 86-8084 (2d Cir. 1986) (airline had no duty under RLA to bargain over its decision to go out of business). However, we urge the Court not to decide the case on this basis because doing so would do nothing to resolve the issues of overriding importance presented by this and other petitions pending before or to be presented to this Court. Indeed, it is in large measure because of the extraneous "going out of business" issue in this proceeding that the Commission is of the view that better vehicles exist for resolution by this Court of the issues of the proper relationship between the ICA, RLA and NLGA in connection with Commission authorization of transactions committed by Congress to the Commission's regulatory supervision.

CONCLUSION

1. In light of the clear and lengthy judicial and legislative history supporting the Commission's independent litigating authority, the Court should accept this petition for filing.

2. As we have indicated in our memorandum of June 23, 1988, *supra,* urging deferral of the decision on whether to grant certiorari in response to the petitions in Nos. 87-1888 and 87-1589, another decision of a Circuit Court of Appeals below, which will perhaps be informed by *en banc* reconsideration,[22] presents more clearly and with fewer extraneous issues the questions the Commission believes must ultimately be resolved by this Court. However, because of the devastating impact the decisions to which the petitions in Nos. 87-1888 and 87-1589 are addressed have had upon the revitalization of the rail industry, we are constrained to file this petition.

For these reasons and the reasons stated in the petitions for writs of certiorari filed by the Pittsburgh and Lake Erie Railroad Company in No. 87-1888 and No. 87-1589, the Court should grant the petition for writ of certiorari to review and reverse the decisions of the Third Circuit Court of Appeals, but should consider substitution of the decision in *BN-MRL,* supra, as the vehicle for plenary consideration by the Court if it

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[22] *BN-MRL, Supra*

becomes available in time to permit a decision by this Court of the issues raised by these various petitions during its October 1988 term.

Respectfully submitted,

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DATED: AUGUST 8, 1988

APPENDIX A

Interstate Commerce Act, 49 U.S.C. § 10101 *et seq.*

Section 10505, 49 U.S.C. § 10505

§ 10505. Authority to exempt rail carrier transportation

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle –

(1) is not necessary to carry out the transportation policy of section 10101a of this title; and

(2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

(b) The Commission may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party.

(c) The Commission may specify the period of time during which an exemption granted under this section is effective.

(d) The Commission may revoke an exemption, to the extent it specifies, when it finds that application of a provision of this subtitle to the person, class, or transportation is necessary to carry out the transportation policy of section 10101a of this title.

(e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from

an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11707 of this title. Nothing in this subsection or section 11707 of this title shall prevent rail carriers from offering alternative terms nor give the Commission the authority to require any specific level of rates or services based upon the provisions of section 11707 of this title.

(f) The Commission may exercise its authority under this section to exempt transportation that is provided by a rail carrier as a part of a continued intermodal movement.

(g) The Commission may not exercise its authority under this section (1) to authorize intermodal ownership that is otherwise prohibited by this title, or (2) to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle.

Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1361; Pub.L. 96-488, Title II, § 213, Oct. 14, 1980, 94 Stat. 1912.

Section 10901, 49 U.S.C. § 10901

§ 10901. Authorizing construction and operation of railroad lines

(a) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may–

(1) construct an extension to any of its railroad lines;

(2) construct an additional railroad line;

(3) acquire or operate an extended or additional railroad line; or

(4) provide transportation over, or by means of, an extended or additional railroad line;

only if the Commission finds that the present or future public convenience and necessity require or permit the construction or acquisition (or both) and operation of the railroad line.

(b) A proceeding to grant authority under subsection (a) of this section begins when an application is filed. On receiving the application, the Commission shall–

(1) send a copy of the application to the chief executive officer of each State that would be directly affected by the construction or operation of the railroad line;

(2) send an accurate and understandable summary of the application to a newspaper of general circulation in each area that would be affected by the construction or operation of the railroad line;

(3) have a copy of the summary published in the Federal Register;

(4) take other reasonable and effective steps to publicize the application; and

(5) indicate in each transmission and publication that each interested person is entitled to recommend to the Commission that it approve, deny, or take other action concerning the application.

(c)(1) If the Commission–

(A) finds public convenience and necessity, it may–

(i) approve the application as filed; or

(ii) approve the application with modifications and require compliance with conditions the Commission finds necessary in the public interest; or

(B) fails to find public convenience and necessity, it may deny the application.

(2) On approval, the Commission shall issue to the rail carrier a certificate describing the construction or acquisition (or both) and operation approved by the Commission.

(d)(1) Where a rail carrier has been issued a certificate of public convenience and necessity by the Commission authorizing the construction or extension of a railroad line, no other rail carrier may block such construction or extension by refusing to permit the carrier to cross its property if (A) the construction does not unreasonably interfere with the operation of the crossed line, (B) the operation does not materially interfere with the operation of the crossed line, and (C) the owner of the crossing line compensates the owner of the crossed line.

(2) If the carriers are unable to agree on the terms of operation or the amount of payment for purposes of paragraph (1) of this subsection, either party may submit the matters in dispute to the Commission for determination.

(e) The Commission may require any rail carrier proposing both to construct and operate a new railroad line pursuant to this section to provide a fair and equitable arrangement for the protection of the interests of railroad employees who may be affected thereby no less protective of and beneficial to the interests of such employees than those established pursuant to section 11347 of this title.

Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1402; Pub.L. 96-448, Title II, § 221, Oct. 14, 1980, 94 Stat. 1928.

Railway Labor Act, 45 U.S.C. § 151, *et seq.*

Section 6, 45 U.S.C. § 156

§ 156. Procedure in changing rates of pay, rules, and working conditions

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proferred its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

May 20, 1926, c. 347 § 6, 44 Stat. 582; June 21, 1934, c. 691, § 6, 48 Stat. 1197.

Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*

Section 4, 29 U.S.C. § 104

§ 104. Enumeration of specific acts not subject to restraining orders or injunctions

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

Mar. 23, 1932, c. 90, § 4, 47 Stat. 70.

Interstate Commerce Commission Regulations, Part 1150– Certificate to Construct, Acquire, or Operate Railroad Lines.

Subpart D–Exempt Transactions, 49 C.F.R. 1150

Subpart D–Exempt Transactions

SOURCE: 51 FR 2504, Jan. 17, 1986, unless otherwise noted.

§ 1150.31 Scope of exemption

(a) Except as indicated below, this exemption applies to all acquisitions and operations under section 10901 (*See* 1150.1, *supra*). This exemption also includes:

(1) Acquisitions by a noncarrier of rail property that would be operated by a third party;

(2) Operation by a new carrier of rail property acquired by a third party;

(3) A change in operators on the line; and

(4) Acquisition of incidental trackage rights. Incidental trackage rights include the grant of trackage rights by the seller, or the assignment of trackage rights to operate over the line of a third party that occur at the time of the exempt acquisition or operation. This exemption does not apply when a class I railroad abandons a line and another class I railroad then acquires the line in a proposal that would result in a major market extension as defined at § 1180.3(c).

(b) Other exemptions that may be relevant to a proposal under this subpart are the exemption for control at § 1180.2(d)(1) and (2), and the from securities regulation at 49 CFR Part 1175.

§ 1150.32 Procedures and relevant dates.

(a) To qualify for this exemption, applicant must file a verified notice providing details about the transaction, and a brief caption summary, conforming to the format in § 1150.34, for publication in the FEDERAL REGISTER.

(b) The exemption will be effective 7 days after the notice is filed. The Commission, through the Director of the Office of Proceedings, will publish a notice in the FEDERAL REGISTER within 30 days of the filing. A change in operators would follow the provisions at § 1150.34, and notice must be given to shippers.

(c) If the notice contains false or misleading information, the exemption is void *ab initio.* A petition to revoke under 49 U.S.C. 10505(d) does not automatically stay the exemption.

§ 1150.33 Information to be contained in notice.

(a) The full name and address of the applicant;

(b) The name, address, and telephone number of the representative of the applicant who should receive correspondence;

(c) A statement that an agreement has been reached or details about when an agreement will be reached;

(d) The operator of the property;

(e) A brief summary of the proposed transaction, including:

(1) The name and address of the railroad transferring the subject property,

(2) The proposed time schedule for consummation of the transaction,

(3) The mile-posts of the subject property, including any branch lines, and

(4) The total route miles being acquired;

(f) A map that clearly indicates the area to be served, including origins, termini, stations, cities, counties, and States; and

(g) A certificate that applicant has complied with the notice requirements of § 1105.11.

[51 FR 2504, Jan. 17, 1986, as amended at 51 FR 25207, July 11, 1986]

§ 1150.34 Caption summary.

The caption summary must be in the following form. The information symbolized by numbers is identified in the key below:

INTERSTATE COMMERCE COMMISSION

Notice of Exemption

Finance Docket No.

(1)—Exemption (2)-(3)

(1) Has filed a notice of exemption to (2)(3)'s line between (4). Comments must be filed with the Commission and served on (5).(6).

Key to symbols:

(1) Name of entity acquiring or operating the line, or both.

(2) The type of transaction, *e.g.*, to acquire, operate, or both.

(3) The transferor.

(4) Describe the line.

(5) Petitioners representative, address, and telephone number.

(6) Cross reference to other class exemptions being used.

The notice is filed under § 1150.31. If the notice contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

APPENDIX B

Supreme Court of the United States

No. A-5

INTERSTATE COMMERCE COMMISSION, APPLICANT

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.,

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 8, 1988.

/s/ WILLIAM J. BRENNAN, JR.
Associate Justice of the Supreme Court of the United States

Dated this 5th
day of July, 1988.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-3797

RAILWAY LABOR EXECUTIVES' ASSOCIATION, APPELLEE

v.

PITTSBURGH & LAKE ERIE RAILROAD CO., APPELLANT

INTERSTATE COMMERCE COMMISSION, INTERVENOR

On Appeal From the United States District Court for the Western District of Pennsylvania (D.C. Civil No. 87-1745)

Argued January 8, 1988

Before: BECKER, HUTCHINSON and COWEN, *Circuit Judges*

[Filed Apr. 8, 1988]

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OPINION OF THE COURT

BECKER, *Circuit Judge.*

In 1926, Congress enacted the Railway Labor Act ("RLA"), in order to prevent railroad strikes from crippling interstate commerce. *See* ch. 347, 44 Stat. 577 (1926), now codified as amended at 45 U.S.C. §§ 151-188 (1982); *Detroit & Toledo Shore Line R.R. v. United Transp. Union,* 396 U.S. 142, 148 (1969). The RLA prohibits a railroad employer from changing "rates of pay,

rules, or working conditions" while a dispute concerning changes in a collective bargaining agreement is being negotiated. 45 U.S.C. § 156 (1982).

In 1887, Congress enacted the Interstate Commerce Act ("ICA"), beginning almost a century of comprehensive regulation of interstate transportation in this country. *See* ch. 104, 24 Stat. 379 (1887). After successive expansions of the scope of the ICA, *see, e.g.,* Transportation Act of 1920, ch. 91, 41 Stat. 456 (1920); Transportation Act of 1940, ch. 722, 54 Stat. 898 (1940), the trend of increasing regulation was broken in 1976 and again in 1980, when Congress passed the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, and the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895. Most pertinent to this case, these Acts drastically reduced the amount of federal involvement in rail mergers and acquisitions, in an effort to implement a congressional policy favoring expedited approvals of sales of railroads, particularly railroads that are in danger of failing. *See generally* H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Admin. News 4110. Under this legislation, the Interstate Commerce Commission ("ICC" or "Commission") has the express power to impose so-called "labor protective" conditions on a sale. *See, e.g.,* 49 U.S.C. §§ 10901(e), 11347 (1985).

This case presents an important question of first impression at the intersection of these two statutes: whether a railroad has a duty to refrain from completing a sale of its rail assets pending bargaining under the RLA over the effects of that sale on the employees' working conditions, when the ICC has granted expedited approval to the (proposed) sale without imposition of labor protective conditions.

The case arises in the context of an appeal from an order granting summary judgment for the plaintiff, Railway Labor Executives Association ("RLEA" or "the unions"), and granting a permanent injunction against the defendant, Pittsburgh & Lake Erie Railroad ("P&LE" or "the railroad"). Plaintiff RLEA is an unincorporated association of the chief executive officers of nineteen railway labor unions, including all fourteen unions that represent P&LE's employees. The district court, in granting summary judgment, ordered the railroad to comply with the "major dispute" resolution procedures of the Railway Labor Act. Moreover, in spite of the fact that the ICC had already approved the proposed sale, the court enjoined the railroad from proceeding with its planned sale of its assets until those procedures had been exhausted, unless the sale agreement included provisions guaranteeing that the employees' current working conditions, including rates of pay, be maintained (the "status quo injunction").

We have little difficulty in concluding that the railroad's decision to sell its rail assets and the consequential elimination of a substantial number of rail jobs presents a so-called "major dispute" under the Railway Labor Act and, therefore, that the railroad must bargain over the effects of that decision. Under the RLA, the railroad must maintain the status quo, including the existence of current jobs and rates of pay, while the bargaining process is pending. We have much greater difficulty with the question of the effect of the ICA on this duty, for there is a strong tension between the policies of the two Acts and, unfortunately, Congress has stranded the courts at the crossing. P&LE contends that the policies expressed in the ICA, particularly as applied by the Interstate Commerce Commission in this case, should relieve the railroad of any

obligations it has under the RLA. The unions, however, argue that the status quo injunction does not conflict with the Commission's approval and is, in fact, mandated by the RLA.

We confess to finding the solution proposed by each party to be unsatisfactory. Dominating our thinking, however, is a reluctance to impinge on a congressional statutory mandate (the RLA) without a clear congressional authorization (and we find none), or to find an implied repeal of the requirements of the venerable Railway Labor Act without an unavoidable conflict between the mandates of the two statutes (and such a conflict is not ineluctable). *See Watt v. Alaska,* 451 U.S. 259, 266-67 (1981). We are particularly reluctant to find such a repeal here, where Congress has so recently addressed itself to deregulating the rail industry, yet has not chosen to relieve management of any of the onerous burdens imposed by the RLA. Moreover, because the Commission's approval of the transaction was merely permissive, we do not view an injunction against the sale as an attack on the ICC's order; and because the approval stemmed from a process in which labor's interests are only one of fifteen factors considered by the Commission, we do not believe that Congress intended that rail labor rely solely on the ICC for protection, to the exclusion of labor's rights under the RLA. For these reasons, we conclude that Congress did not intend the Commission's approval of the transaction without the imposition of substantive labor protective conditions to relieve the railroad of its obligation to comply with the exclusive congressionally-mandated RLA dispute resolution procedures.

We recognize that, arguably, in our effort to avoid impinging on the RLA, our decision instead has the effect of contravening the mandate of the ICA. We do not

believe that it does but, if we are mistaken, we still believe we have reached the correct result: plainly, if either a grant *or* a denial of the status quo injunction will conflict with a statutory mandate, we must reconcile the two statutes as much as possible and attempt to reach a result that will produce the minimum possible conflict with congressional intent. As we will demonstrate, any conflict with the ICA produced by the order to maintain the status quo is substantially less than the conflict with the RLA that would result from a denial of the injunction. We therefore choose the path of least destruction, and the one we deem most consistent with Supreme Court precedent. If Congress intended a different result – and we concede that a different result might well be desirable – it should have said so. We therefore will affirm the district court's order.

I. STATUTORY BACKGROUND

A. *The Railway Labor Act*

The Railway Labor Act is the product of a joint effort by labor and management representatives to channel labor disputes into constructive resolution procedures as a means of avoiding interruptions to commerce and preventing strikes. *See Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 148-49 & n.13 (1969). There are two types of disputes that can arise under the RLA – "major" disputes, which involve efforts to form or proposals to change collective bargaining agreements, and "minor" disputes, which require the interpretation or application of a specific provision of a collective bargaining agreement.[1] *See Detroit*

[1] The terms "minor" and "major" disputes do not appear in the statute itself. Rather, they are time-honored judicially-created

& Toledo Shore Line, 396 U.S. at 148; *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 722-28 (1945); *International Ass'n of Machinists v. Northwest Airlines*, 673 F.2d 700, 705-06 (3d Cir. 1982).

Major disputes "look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past;" in minor disputes, "the claim is to rights accrued, not merely to have new ones created for the future." *Elgin, J. & E. Ry.*, 325 U.S. at 723. Minor disputes are resolved through a formal grievance process that culminates in binding arbitration performed by the National Railroad Adjustment Board. RLA § 3, 45 U.S.C. § 153. Major disputes, on the other hand, are channeled into an exhaustive bargaining process, designed to force the parties into serious negotiation and to encourage compromise. RLA § 6, 45 U.S.C. § 156; *see Detroit & Toledo Shore Line*, 396 U.S. at 148-50.

When a minor dispute arises, the parties are not precluded from changing the status quo; management is free to implement its interpretation of the agreement, unless and until the interpretation is held invalid by the Adjustment Board. *See, e.g., United Transp. Union v. Penn Cent. Transp. Co.*, 505 F.2d 542, 545 (3d Cir. 1974); *Maine Cent. R.R. v. United Transp. Union*, 787 F.2d 780, 781 (1st Cir.), *cert. denied*, 107 S. Ct. 169 (1986); *cf. Local 553, Transp. Workers Union v. Eastern Air Lines*, 695 F.2d 668, 675 (2d Cir. 1983) (status quo injunction is available, pending arbitration of a minor dispute, only when necessary to prevent arbitration from becoming meaningless).

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nomenclature for the statutory categories. *See Elgin, J. & E. Ry.*, 325 U.S. at 723-24; Local 553, Transport Workers Union v. Eastern Air Lines, 695 F.2d 668, 673 (2d Cir. 1983).

Major disputes, however, trigger a status quo obligation. Once a party proposes a change in the collective bargaining agreement, that party is required to serve notice of its intentions (a "section 6 notice"), and both parties must maintain the status quo until the RLA bargaining processes have been exhausted. *See Detroit & Toledo Shore Line*, 396 U.S. at 150-53; RLA § 6, 45 U.S.C. § 156 ("rates of pay, rules, or working conditions shall not be altered by the carrier until [bargaining and mediation have been exhausted]"); RLA § 2 Seventh, 45 U.S.C. § 152. Those processes have been described by the Supreme Court as "almost interminable." 396 U.S. at 149. They operate as follows:

> A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. § 6. The parties must confer, § 2 Second, and if conference fails to resolve the dispute, either or both may invoke the services of the National Mediation Board, which may also proffer its services *sua sponte* if it finds a labor emergency to exist. § 5 First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. §§ 5 First, 7. If arbitration is rejected and the dispute threatens "substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President," who may create an emergency board to investigate and report on the dispute. § 10. While the dispute is working its way through these stages, neither party may unilaterally alter the *status quo*. §§ 2 Seventh, 5 First, 6, 10.

Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 378 (1969).

In the end, however, the process is merely conciliatory. Unlike minor disputes, which parties must submit to binding arbitration, major disputes will be resolved, through a series of seemingly endless negotiations, by the parties themselves, or will not be resolved at all; agreements will not be imposed upon the parties. Once the process is finally exhausted and it becomes clear that the parties will not reach agreement, the parties are released from their status quo obligations, and are free to resort to "self-help" – management to implement its proposed changes, and the workers to strike. *Id.* at 378-80.

B. *The Interstate Commerce Act and the ICC*

The Interstate Commerce Act gives the ICC exclusive jurisdiction to approve and to regulate acquisitions of rail lines. *See, e.g.*, 49 U.S.C. §§ 10901(a), 11343(a) (Supp. III 1985); *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318-20 (1981). Section 10901 of the Act governs the acquisition of rail lines by non-carriers. Such transactions may proceed only "if the Commission finds that the present or future public convenience and necessity require or permit the [acquisition] and operation of the railroad line." 49 U.S.C. § 10901(a). The ICC has discretion to condition its approval of a § 10901 transaction on the provision of "a fair and equitable arrangement for the protection of the interests of railroad employees who may be affected [by the transaction]." § 10901(e). However, pursuant to § 10505, the Commission will exempt any transaction from regulation under § 10901 when it finds that such regulation "is not necessary to carry out" national rail

transportation policy, and is "not needed to protect shippers from the abuse of market power." 49 U.S.C. § 10505(a).

In a 1985 rulemaking proceeding, the Commission decided to exempt from regulation under § 10901 the entire class of transactions involving acquisitions by non-carriers. *See Ex Parte 392* (Sub. No. 1), *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985) [hereinafter *Ex Parte 392*], *review denied mem. sub nom. Ill. Commerce Comm'n v. ICC*, 817 F.2d 145 (D.C. Cir. 1987). Under *Ex Parte 392*, an exemption becomes effective and a transaction is deemed approved after seven days following the filing of a notice by the acquiring entity, 49 C.F.R. § 1150.32(b); 1 I.C.C.2d at 820, unless a petition to revoke the exemption has been filed and granted or the transaction is stayed by the Commission. *See* 49 U.S.C. § 10505(d); 49 C.F.R. § 1150.34; 1 I.C.C.2d at 815.

II. FACTS AND PROCEDURAL HISTORY

A. *The Sale and the Requests to Bargain*

P&LE owns and operates a railroad in western Pennsylvania and eastern Ohio. The railroad has suffered heavy financial losses over the past four years, and has accumulated a substantial amount of debt.[2] Unable to stem its losses and in an effort to avoid a bankruptcy proceeding, P&LE sought a buyer for its entire rail operations. On July 8, 1987 it entered into an agreement to sell all of its assets (except for some minor real

[2] P&LE claims losses of $60 million over the past five years, and accumulated debt of $124 million as of September, 1987. RLEA has not contested these figures.

estate holdings and 6,000 rail cars) for slightly more than $70 million to P&LE Railco, Inc. ("Railco"), a newly-formed subsidiary of the Chicago West Pullman Corporation created for the purpose of acquiring P&LE's assets.[3] After the sale, Railco plans to operate P&LE's rail lines, and P&LE expects to cease operation as a rail carrier.

On July 30, 1987 P&LE informed its unions of the planned sale. Although P&LE provided no details, it was apparent that Railco intended to operate with a substantially reduced workforce, and that as many as 500 of P&LE's 750 rail employees would lose their jobs. Beginning on August 7, P&LE's various unions requested that the railroad serve formal notices of its intentions on the unions, pursuant to section 6 of the RLA, 45 U.S.C. § 156, and that the railroad commence formal RLA bargaining over the effects of the proposed transaction on the employees. P&LE refused, claiming that RLA bargaining was not required because the transaction would be subject to the exclusive jurisdiction of the ICC, pursuant to the Interstate Commerce Act.

Given P&LE's refusal, RLEA filed a complaint on August 19, 1987 in the District Court for the Western District of Pennsylvania, seeking an order requiring the railroad to exhaust RLA bargaining procedures before proceeding with the sale. At about the same time, the unions began to serve section 6 notices, proposing substantial labor protection, including the preservation of all current jobs.

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[3] Railco is actually owned by the Chicago West Pullman Transportation Corporation, which operates four short line railroads, and which in turn is owned by the Chicago West Pullman Corporation.

B. *The ICC's Approval*

On September 19, 1987, pursuant to 49 C.F.R. §§ 1150.31-34,[4] Railco filed a "notice of exemption" with the ICC, seeking exemption from the regulatory requirements of 49 U.S.C. §10901.[5] RLEA and other interested parties filed a petition to reject the exemption, and requested a stay of the transaction. The ICC denied the request for a stay on September 25, declaring that the transaction was governed by § 10901 and that RLEA had not shown a sufficient likelihood of prevailing on the merits to justify imposing labor protection prior to consummation of the sale. *P&LE Railco, Inc.–Exemption Acquisition and Operation–Lines of the Pittsburgh and Lake Erie Railroad Co. and the*

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[4] Sections 1150.31-34 of 49 C.F.R. codify the ICC's 1985 rulemaking in *Ex Parte 392*.

[5] As discussed above, section 10901 applies only to purchases by non-carriers, and not by existing carriers. The ICC has repeatedly ruled that subsidiaries of operating railroads that have been specifically formed to acquire marginal rail lines will be considered non-carriers for purposes of the acquisition, and these rulings have been upheld as within the ICC's discretion by the courts, at least as long as the subsidiary is financially independent of its parent corporation. *See* RLEA v. ICC, 819 F.2d 1172-73 (D.C. Cir. 1987); RLEA v. United States, 791 F.2d 994, 1005-06 (2d Cir. 1986). The ability to proceed under § 10901 as a non-carrier, rather than under the analogous provision for acquisitions by carriers, 49 U.S.C. §§ 11343-44, is quite significant, because labor protective provisions are discretionary in transactions involving a non-carrier, but mandatory in transactions between the carriers. *Compare* § 10901(e) ("The Commission *may* require [labor protection]") (emphasis added) *with* § 11347 (the "Commission *shall* require" such protection in transactions approved under § 11344) (emphasis added). The decision to proceed under § 10901 is not challenged on this appeal. Such a challenge could only be made by a petition for review of an ICC order. *See* 28 U.S.C. §§ 2321(a), 2342(5).

Youngstown and Southern Ry. Co., ICC Finance Docket Nos. 31121, 31122, 31126 (Sept. 25, 1987).[6]

In denying the request, the Commission explained that a stay would delay the transition between P&LE's and Railco's service, thereby possibly causing substantial harm to the parties, as well as to the shippers, employees and communities on the line. A stay of the transaction, the ICC further found, would force P&LE to suffer continued financial losses, and given those losses, "[i]t is unclear whether or how long it can continue operations." *Id.* at 4. The Commission, however, did order P&LE to maintain its corporate existence until the Commission completed review of any petitions for revocation. ICC Finance Docket Nos. 31121, 31122 (Oct. 13, 1987) (denial of petition for reconsideration). RLEA filed a petition for revocation on October 2, 1987, which is still pending.

C. *The Strike and the Status Quo*

On September 15, 1987, prior to Railco's filing of its notice of exemption with the ICC, the unions commenced a strike to force P&LE to comply with its duty to bargain under the RLA. P&LE then filed a counterclaim in the district court, seeking to enjoin the strike. The district court first denied a temporary restraining order, holding itself barred by the anti-injunction strictures of the Norris-LaGuardia Act ("NLGA"), 29 U.S.C. § 108 (1982), but then reversed itself in the wake of the ICC's refusal to stay the transaction. The district court

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[6] The Commission did note, however, that, "in the unlikely event that the Commission imposes labor protection in a future exemption revocation proceeding," such a remedy could be imposed post-consummation by revoking the exemption. ICC Finance Docket Nos. 31121, 31122, 31126 (Sept. 25, 1987) at 3.

held the strike to be an illegal attempt to force P&LE to provide labor protection in connection with the sale, in contravention of the ICC's approval of the sale without labor protective provisions. Finding that the strike frustrated P&LE's efforts to complete the sale, the court enjoined the strike, holding that the ICC's exclusive jurisdiction over the transaction displaced the anti-injunction provisions of the NLGA. This court, however, summarily reversed on October 26, holding that "[t]he ICC's authority to consider the incidental effect of the transaction on labor and its discretionary authority to require provisions that protect employees" could not override the "strong national policy embodied in the [NLGA]." *RLEA v. P&LE,* 831 F.2d 1231, 1236 (3d Cir. 1987).[7] We therefore remanded the case for further proceedings. *Id.* at 1237.

On November 24, following remand, the district court granted summary judgment for RLEA, holding that the instant dispute was a "major" dispute under the RLA,

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[7] Following our October 26 opinion the unions did not resume their strike. However, the railroad believes that the strike will be renewed if any action is taken to consummate the sale. Brief of Appellant at 19. Although not made explicit by P&LE in this appeal, the railroad argued quite strongly in the prior appeal that the effect of the strike would likely be to block the consummation of the sale. *See* Memorandum of the P&LE R.R. Co. in Opposition to Emergency Motion at 2, RLEA v. P&LE, 831 F.2d 1231 (3d Cir. 1987) ("rail labor could simply block the ICC-authorized transaction by calling a strike"); *id.* at 18, 29; *see also* P&LE's Verified Counterclaim ¶ 13, J.A. 11, 14 ("Unless restrained, the strike could also interfere with and preclude P&LE from finalizing the sale of its assets to Railco."); Affidavit of Gordon E. Neuenschwander, President of P&LE ¶ 12, J.A. 20, 22 ("A strike will damage P&LE's ability to follow through on the sale of its assets to P&LE Railco. If this sale is not consummated, it is unlikely that the P&LE could find another buyer willing to agree to the same terms and conditions of sale.").

and that therefore P&LE must bargain over the effects on the employees of the proposed sale before implementing the transaction. The court rejected P&LE's argument that the ICC's exclusive jurisdiction over rail carrier transactions preempted the railroad's obligations under the RLA. The court held the RLA applicable, and issued a status quo injunction, enjoining the railroad from "altering the rates of pay, rules and working conditions in existence at the time [the unions served their] section 6 notices." J.A. 369. *See* 45 U.S.C. § 156. The court further made clear that the sale could not be consummated unless provisions were made for the maintenance of the status quo, i.e., maintenance of the employees' current jobs and rates of pay. J.A. 369-70.

P&LE filed an emergency motion with this court, seeking summary reversal of the injunction order. We denied the motion on December 10, 1987, however we expedited the appeal.[8]

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[8] Subsequent to oral argument, RLEA informed us by letter memorandum of developments that potentially could moot this appeal. According to a letter from Richard L. Wyatt, Jr., counsel for P&LE, to John O'B. Clarke, Jr., counsel for RLEA, P&LE claims that its agreement to sell its assets to Railco has been terminated and that P&LE is no longer obligated to consummate the sale, although P&LE still is actively seeking a purchaser for its rail assets. However, according to the letter, Railco takes the position that the agreement is still viable, and Railco is seeking to enforce the agreement in the United States District Court for the Southern District of Ohio. Because the proposed sale to Railco has merely been sidetracked, rather than derailed, because P&LE still is actively seeking to sell its rail assets and its unions still are actively asserting their right to bargain over the effects of any sale on their members' working conditions, and because we believe that the ICC, under its streamlined approval process initiated by *Ex Parte 392*, will readily grant an exemption to any viable purchaser of the

III. THE DUTY TO BARGAIN

A. *Does The Case Involve A Major Dispute?*

P&LE argues, albeit weakly, that its dispute with RLEA is not a "major" dispute. *See* Brief of Appellant at 72; Reply Brief of Appellant at 4-10. Apparently, P&LE is contending that because it always has the "right" to go out of business, and because the sale of the railroad would not violate the collective bargaining agreements, no "change" in the agreement has been proposed and thus no major dispute has arisen. The argument, however, misses the mark.

The dispute in this case is not about the decision to sell the P&LE's rail lines; it is about the effects of that decision on the employees of the railroad.[9] P&LE does not deny that the sale, as it is now structured, will lead to a substantial reduction in the workforce on the rail line. This loss of jobs by possibly two-thirds of the employees clearly would require a "change in agreements affecting rates of pay, rules, or working conditions." RLA § 6,

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struggling P&LE's lines, we believe that we are still faced with a live controversy over RLEA's entitlement to a bargaining order and status quo injunction. That is, this case is not moot because each party continues to retain a "legally cognizable interest in the outcome," thus insuring a "sufficient functional adversity" between the parties to justify the invocation of our jurisdiction. *Int'l Bhd. of Boilermakers v. Kelly*, 815 F.2d 912, 915 (3d Cir. 1987) (citations omitted).

[9] There is no argument about whether the collective bargaining agreement itself permits or prohibits the proposed sale. If *that* were the crux of the dispute, then this case would require an interpretation of the agreement, and would thus be a minor dispute, to be resolved by arbitration. P&LE's agreements with its unions, however, do not appear to contemplate this type of transaction, and thus neither expressly permit nor prohibit the sale.

45 U.S.C. § 156. Whenever a party intends to implement such a change, the RLA requires that the party submit to the major dispute resolution process, and not alter the status quo. *Id.*[10]

In the leading case of *Detroit & Toledo Shore Line*, the railroad notified its union that it intended to require certain employees to report to work at Trenton, Michigan instead of Toledo, Ohio. An Adjustment Board had already determined that the collective bargaining agreement would not prohibit such "outlying work assignments." 396 U.S. at 145-46. Yet, when the union served a section 6 notice on the employer proposing to amend the agreement to forbid all outlying assignments, the Supreme Court held that a major dispute had arisen and that the railroad was prohibited from implementing the new assignments until after the parties had exhausted the RLA bargaining process, even though implementation of these assignments would not violate the existing agreement. *Id.* at 148-55.

The Court explained that "the status quo extends to those actual, objective working conditions out of which the dispute arose." *Id.* at 153. Because the "actual working conditions" at the time the dispute arose did not include outlying assignments, "[i]t was therefore incumbent upon the railroad by virtue of § 6 to refrain from making outlying assignments . . . , regardless of the fact that the railroad was not precluded from making these assignments under the existing agreement." *Id.* at 154.

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[10] Moreover, the dispute is a major dispute under the RLA because it "look[s] to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past." *Elgin, J. & E. Ry.*, 325 U.S. at 723.

P&LE has similarly proposed action which might not *violate* its agreements, yet it plainly would *change* the nature of those agreements. Moreover, even if that were not the case, P&LE's unions have proposed substantial changes to the agreements, and therefore P&LE must "preserve and maintain unchanged those actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute." *Id.* at 153. Such objective conditions plainly include the very existence of the workers' jobs.

B. *The Right to Go Out of Business And The Duty to Bargain Over Effects*

P&LE makes a more powerful argument that, no matter how this dispute is categorized, an employer has no duty to bargain over its decision to go out of business, for such a decision is a quintessential management prerogative, hence it cannot be enjoined. The argument rests primarily on the Supreme Court's landmark decision in *First National Maintenance Corp. v. NLRB,* 452 U.S. 666 (1981).

In *First National Maintenance,* the Court held that an employer's decision to shut down part of its business is a management prerogative about which the employer need not bargain with its employees, even though the decision would lead directly to the loss of employee jobs. In words that P&LE claims are applicable here, the Court explained that "management may have great need for speed, flexibility, and secrecy" in implementing its decision to close, and such need could be frustrated by imposing a duty to bargain over the decision. *See* 452 U.S. at 682-83.

However, the Court also made clear that the union need not be left out in the cold; "the union must be given a significant opportunity to bargain about . . . matters of job security as part of the 'effects' bargaining mandated by § 8(a)(5) [of the National Labor Relations Act ('NLRA')]." *Id.* at 681 (citations omitted); *see also id.* at 677 n.15. Such effects bargaining "must be conducted in a meaningful manner and at a meaningful time," and the Court recognized that, "by pursuing such bargaining rights, [a union] may achieve valuable concessions from an employer engaged in a partial closing." *Id.* at 682. The Court further explained that the union, through its control over the effects, "indirectly may ensure that the decision itself is deliberately considered." *Id.*

P&LE insists that it stands ready to bargain over the effects of the sale,[11] and that it will continue to so bargain even after the sale is completed. However, it argues, the consequence of the injunction against sale, pending bargaining, is that the union can now impose its influence not only on the effects of the decision, an issue in which it has a legitimate interest, but also on the very decision to sell, an exclusive management prerogative. This, P&LE maintains, gives the union a veto power over the sale, a result prohibited by *First National Maintenance.*

We concede that P&LE has made a powerful argument, for imposing the RLA requirements in this situation may well have the practical effect of torpedoing the sale. However, we need not decide whether P&LE's

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[11] In fact, P&LE insists that such bargaining has already taken place, through a series of meetings with union representatives in September and October, held "without prejudice to [the railroad's] position that it had no mandatory duty to engage in effects bargaining under Section 6 of the Railway Labor Act." Brief of Appellant at 16.

offer of post-sale bargaining could possibly constitute bargaining "in a meaningful manner and at a meaningful time," for, although we would like to hold that the cumbersome procedures of the RLA are inapplicable here, we are constrained by the law to conclude that the RLA applies, and that more is required than mere post-sale bargaining.

We note first that it is far from clear whether *First National Maintenance*, a case interpreting the NLRA, is applicable to a railroad employer. It is by now almost axiomatic that NLRA and RLA cases are not freely interchangeable, as the two statutes have distinctly different histories and different approaches to the problem of labor-management relations. *See, e.g., Brotherhood of R.R. Trainmen*, 394 U.S. at 383-84; *Air Line Pilots Ass'n v. United Air Lines*, 802 F.2d 886, 897-98 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 1605 (1987); *Ruby v. American Airlines*, 323 F.2d 248, 256 (2d Cir. 1963) (Friendly, J.), *cert. denied*, 376 U.S. 913 (1964). This is not to say that NLRA *principles* are not useful in the railroad context, but only that they cannot be applied blindly. *See, e.g., Brotherhood of R.R. Trainmen*, 394 U.S. at 383, 391.

In *First National Maintenance*, the Court itself recognized that its decision might not apply in the RLA context, and that, in fact, it might conflict with RLA precedent. The Court felt bound to distinguish an earlier RLA case, *Order of Railroad Telegraphers v. Chicago & North Western Railway Co.*, 362 U.S. 330 (1960), which could be read to hold that a union has the right to bargain over the effects on job security of certain traditionally exclusive management decisions. In doing so, the Court noted that the earlier decision had

> rested on the particular aims of the Railway Labor Act and national transportation policy. *See* 362

> U.S., at 336-338, 80 S.Ct., at 764-765. The mandatory scope of bargaining under the Railway Labor Act and the extent of the prohibition against injunctive relief contained in Norris-LaGuardia are not coextensive with the National Labor Relations Act and the Board's jurisdiction over unfair labor practices. *See Chicago & N.W.R. Co. v. Transportation Union*, 402 U.S. 570, 579, n.11, 91 S. Ct. 1731, 1736, n.11, 29 L.Ed.2d 187 (1971) ("parallels between the duty to bargain in good faith and the duty to exert every reasonable effort, like all parallels between the NLRA and the Railway Labor Act, should be drawn with the utmost care and with full awareness of the differences between the statutory schemes").

First Nat'l Maintenance, 452 U.S. at 686 n.23.

We need not decide, however, whether *First National Maintenance* actually applies to railway employers, because we conclude that, whether the case applies or not, the railroad has a duty to bargain over the effects of the transaction prior to implementing its unilateral decision to sell its rail assets.

If *First National Maintenance* does not apply, then, because the instant dispute is a major dispute, *see supra* Part III.A., under the RLA the union was entitled to a status quo injunction, which of course requires the railroad to maintain in existence the workers' actual jobs.

We find support for this position in *Order of Railroad Telegraphers*. There, the railroad proposed to abandon certain stations which it no longer found economical to maintain. When the union served section 6 notices, proposing to amend the collective bargaining agreement to prohibit the abolition of any jobs then in existence, the railroad refused to bargain. The union struck in protest,

and the railroad sought an anti-strike injunction, claiming that the union was striking over a non-bargainable issue. The Supreme Court disagreed.

"We cannot agree," the Court said, "that the union's effort to negotiate about the job security of its members 'represents an attempt to usurp [a] legitimate managerial prerogative in the exercise of business judgment with respect to the most economical and efficient conduct of its operations.'" 362 U.S. at 336 (citation omitted). We read this (and apparently so did the Supreme Court in *First National Maintenance*) to reject implicitly the idea that a subject is off-limits to RLA bargaining merely because it could be labeled a "managerial prerogative." To the contrary, when a decision affects the very existence of the workers' jobs, the RLA mandates bargaining.[12]

We recognize, of course, that the decision to abandon an entire line of business could be viewed as qualitative-

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[12] In *Telegraphers*, the Court explained that

> It is too late now to argue that employees can have no collective voice to influence railroads to act in a way that will preserve the interests of the employees as well as the interests of the railroad and the public at large.

Order of R.R. Telegraphers, 362 U.S. at 338. It seems to us that, if workers can insist on bargaining to preserve jobs when the railroad proposes to abandon certain stations, they similarly can demand bargaining when the railroad proposes to abandon its ownership of an entire line. *See also id.* at 339 ("the union's effort to negotiate its controversy with the railroad was in obedience to the Act's command that employees *as well as railroads* exert every reasonable effort to settle all disputes 'concerning rates of pay, rules, and working conditions.' [RLA § 2 First, 45 U.S.C. § 152 First.]") (emphasis added); *id.* at 341 ("it is impossible to classify as a minor dispute this dispute relating to a major change, affecting jobs, in an existing collective bargaining agreement, rather than to mere infractions or interpretations of the provisions of that agreement").

ly different from the decision to abandon several stations, the former being particularly appropriate for managerial discretion. We nevertheless find *Telegraphers* helpful, for just as an employer surely has a "right to terminate his entire business," *see First Nat'l Maintenance*, 452 U.S. at 677 (quoting *Textile Workers v. Darlington Co.*, 380 U.S. 263, 268 (1965)), an employer similarly has a "right" to abandon operations at certain locations of its business, in effect a decision to close down certain parts of the business. Yet in spite of the uniquely managerial nature of the decision, the Supreme Court has plainly countenanced RLA bargaining over the effects of the decision. We believe the court would extend *Telegraphers* to a sale such as this.

The Fifth Circuit has read *Telegraphers* similarly. In *United Industrial Workers v. Board of Trustees of Galveston Wharves*, 351 F.2d 183 (5th Cir. 1965), the court held that a carrier's decision to lease a grain elevator to a third party and consequently discharge employees who work on that elevator constitutes a change in working conditions, triggering a major dispute. Thus, under section 6 of the RLA, the carrier was required to bargain with the union *prior* to implementing the lease. "We may assume that an employer has the legal right to go out of business," the court stated, "[b]ut under the Railway Labor Act when he does so during the term of the agreement, it is such a change in 'working conditions' that under § 6 and § 2 Seventh, he must give notice." *Id.* at 190. Once notice is given, the court held, "the procedure of § 6 [is] set in train," giving the union "a right to bargain." *Id.*[13] *Cf. In re Michigan Interstate*

[13] Such bargaining, the court explained, need not be futile; it might well lead to saving some of the lost jobs, with the new operator. 351 F.2d at 191. We recognize that in the case at bar the

Ry. Co., 34 Bankr. 220, 226-27 (E.D. Mich. 1983) (state-mandated reduction in rail service from over 300 route miles to approximately 47 miles, which led to a concomitant reduction in workforce from 384 union employees to 33 union employees, produced a change in working conditions and therefore a major dispute, and was therefore a unilateral change prohibited by section 6).

Alternatively, even if *First National Maintenance* does apply in the railway context, it simply cannot be read in a vacuum. We believe that it must be read in the context of the railroad's RLA obligations. We agree, and the union apparently concedes, that the railroad has no obligation to bargain over the underlying decision itself, *viz.*, to cease operating as a railroad and to sell its rail assets. *See First Nat'l Maintenance*, 452 U.S. at 686. However, *First National Maintenance* does not cut off all bargaining; it mandates bargaining over the *effects* of the transaction. There is much logic in applying this duty to bargain over effects, even in an RLA context, because both the RLA and the NLRA use similar language to describe the scope of mandatory bargaining.[14] However, although the scope of bargaining under the two statutes may be similar, plainly the processes are quite different, and unfortunately *First National Maintenance* cannot be read to rewrite the intricate RLA bargaining *process*.

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railroad may be in no position to save lost jobs. However, it may have the ability to share some of the proceeds from the sale with its employees, as severance payments.

[14] Section 8(d) of the NLRA requires the parties to bargain collectively "with respect to wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d). Section 6 of the RLA requires the invocation of the major dispute resolution process whenever a party intends a "change in agreements affecting rates of pay, rules, or working conditions." 45 U.S.C. § 156.

P&LE contends that by granting the status quo injunction, the district court has given the union a "powerful tool for achieving delay," a tool that the *First National Maintenance* Court expressly refused to give to the union. *See* 452 U.S. at 683 (labeling the decision to close a business a mandatory subject of bargaining "could afford a union a powerful tool for achieving delay, a power that might be used to thwart management's intentions in a manner unrelated to any feasible solution the union might propose"). However, we do not believe that *First National Maintenance* can be read to relieve the railroad of its duty to comply with the RLA bargaining process, and that process is designed to produce just such a delay. As the Supreme Court has explained:

> The Act's status quo requirement is central to its design. Its immediate effect is to prevent the union from striking and management from doing anything that would justify a strike. In the long run, delaying the time when the parties can resort to self-help provides times for tempers to cool, helps create an atmosphere in which rational bargaining can occur, and permits the forces of public opinion to be mobilized in favor of a settlement without a strike or lockout. Moreover, since disputes usually arise when one party wants to change the status quo without undue delay, the power which the Act gives the other party to preserve the status quo for a prolonged period will frequently make it worthwhile for the moving party to compromise with the interests of the other side and thus reach agreement without interruption to commerce.

Detroit & Toledo Shore Line, 396 U.S. at 150.[15]

Once we have determined that a railroad employer must bargain over a particular subject (here, the effects on the employees of the sale), and that that subject implicates a change in the current agreements and working conditions (here, the elimination of many workers' jobs), the RLA process is clear, and we find nothing in *First National Maintenance* that calls it into question. Thus, under section 6 of the Railway Labor Act, the railroad must maintain the status quo, unless the status quo

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[15] We do not pretend that the imposition of the RLA bargaining *process* on this dispute will have no *substantive* effect on the outcome. In fact, we recognize that it may have a profound and damaging effect on P&LE's very ability to proceed with the transaction. However, as we have already suggested, the power of delay and the leverage given to labor is inherent in the design of the RLA, and surely was understood and contemplated by its framers. We frankly recognize that such a delay may conflict with recent policies expressed by Congress in amending the ICA. During the course of our deliberations in this case we contemplated a holding that, due to the strong tension between the policies of the RLA and the ICA in this situation, Congress could not have contemplated that effects bargaining would have to take place under the cumbersome aegis of the RLA, because the long delay involved could torpedo the sale. We utimately rejected this solution, for the reasons discussed *infra*, Part III. However, in struggling with this issue, we did consider the possibility of alleviating the immense burden of such a delay, possibly by ordering a streamlining of the tedious RLA process. *Cf.* Brotherhood of Ry., Airline and Steamship Clerks v. REA Express, 523 F.2d 164, 171 (2d Cir. 1975) (holding that a debtor under the Bankruptcy Act need not comply with the "elaborate and protracted" RLA procedures, but rather need only "negotiate in good faith for a reasonable length of time"), *cert. denied*, 423 U.S. 1017 (1975) & 423 U.S. 1073 (1976). Unfortunately, we found that such a solution could not be justified here, given the lack of a direct and unavoidable conflict between the ICA and RLA. *See infra*, note 50.

obligation is overriden by the ICA. To that issue, we now turn.

IV. THE EFFECT OF THE ICC'S ACTION UNDER THE ICA ON THE RAILROAD'S DUTY TO BARGAIN UNDER THE RLA

The Interstate Commerce Act gives the ICC exclusive jurisdiction to approve and to regulate acquisitions of rail lines. *See supra* Part I.B. Pursuant to this jurisdiction, the ICC has authorized the sale of P&LE's lines to the newly-formed Railco, and elected not to exercise its discretion to impose labor protective provisions on the transaction.[16] Although P&LE presents several arguments flowing from this state of affairs, they all boil down to essentially the same contention: the ICC's approval of this transaction without imposing labor protection relieves the railroad of any duty it might otherwise have had to bargain over the effects of the sale upon the workforce or to retain the status quo.

We will address P&LE's argument in each of its formulations. However, we will first discuss the powerful congressionally-articulated policies (and administrative implementation of those policies) that support P&LE's argument. Although we ultimately reject the railroad's

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[16] In its 1985 rulemaking, *Ex Parte 392*, *see supra* Part I.B, the ICC declared that only in "an extraordinary case," given "an exceptional showing of circumstances," would the Commission impose labor protection on a transaction approved under § 10901. 1 I.C.C.2d at 815. We are unaware of any instance since that time where the ICC has found the requisite "exceptional circumstances." Moreover, the railroad itself concedes that the ICC has granted only one petition for revocation under *Ex Parte 392*, and that was not because the Commission desired to impose labor protection, but rather because the Commission found that the transaction should proceed under § 11343 rather than § 10901. *See* Brief of Appellant at 47 n.18. However, we do note that RLEA's petition for revocation in this case is still pending. *See supra* Part II.B.

position, we will show how the recent trend of legislative action makes this a most difficult case, because Congress has articulated policies (although not laws) which conflict with the long and drawn out RLA bargaining procedure. These policies, as will be shown, bear heavily on the plight of P&LE.

A. *Streamlining Regulation: A Response to The Decline of the Railroad Industry*

1.

At the outset, we note that the railroad industry in America has been in decline for some time, and that the plight of the Pittsburgh & Lake Erie Railroad is not an uncommon one. Congress has recognized the problem and, faced with the prospect of a failing yet critically important industry, has attempted to remedy the situation, in part, through several deregulatory statutes. In 1976, in an effort to stem the financial decline of the railroads, Congress passed its first major revision of the Interstate Commerce Act since 1940 – the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R"), Pub. L. No. 94-210, 90 Stat. 31. The 4-R Act began the trend toward deregulation of the railroad industry, with regard both to rate setting and to acquisition approvals. The congressional committee reports described the serious financial difficulties of the industry, and noted the necessity for substantive changes in the way railroads were regulated, in an effort "to allow railroads to compete with other modes of transportation," while "maintain[ing] necessary protections for rail service consumers." S. Rep. No. 499, 94th Cong., 2d Sess. 1, *reprinted in* 1976 U.S. Code Cong. & Admin. News 14, 15; *see also* S. Conf. Rep. No. 595, 94th Cong., 2d Sess. 133, *reprinted in* 1976 U.S. Code Cong. & Admin. News

148. Congress thus began the process of streamlining the ICC's "inflexible" procedures in an effort to expedite the regulatory process, S. Rep. No. 499, 94th Cong., 2d Sess. 15, particularly with regard to mergers and consolidations, which Congress intended to encourage, *see id.* at 17-21.

Congress' 1976 effort, however, proved to be insufficient, for the decline continued. By 1980, when Congress next addressed the problem, it recognized that more drastic measures would be necessary if revitalization of the nation's rails were to be more than just a dream. Historically, Congress found, the purpose of the ICA had been to prevent the abuse of the railroad's monopoly powers, and thus to protect the shippers and producers who were fully dependent on the rails to bring their goods to market. *See* H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 79 [hereinafter Staggers Conf. Rep.], *reprinted in* 1980 U.S. Code Cong. & Admin. News 4110. By 1980, however, the transportation market in the United States had changed dramatically, and legislation well-suited to the pre-War economy was no longer responsive to the needs of a changing society. The interstate transportation industry, once largely monopolized by rail service, had become intensely competitive, and rail service, under the yoke of a burdensome regulatory statute, was losing the battle for the marketplace. Whereas rail transport once had carried virtually all intercity freight, by 1980 the railroads' market share had diminished to just over one third.[17] *Id.*

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[17] Although industrial production increased by 250 percent from 1947 to 1977, the railroads carried 91 percent fewer tons in 1977 than thirty years earlier. H.R. Rep. No. 1035, 96th Cong., 2d Sess. 35, *reprinted in* 1980 U.S. Code Cong. & Admin. News 3978, 3980.

Finding industry earnings at or below survival levels, and finding a severe inability to generate funds for needed capital improvements, Congress concluded that a dramatic departure from the historic regulatory approach was needed. *Id.*; *see also* H.R. Rep. No. 1035, 96th Cong., 2d Sess. 95-119 [hereinafter Staggers House Rep.], *reprinted in* 1980 U.S. Code Cong. & Admin. News 3978, 4039-63. With its goal the rehabilitation and revitalization of a nearly-moribund industry, Congress determined to remove much of the regulatory restraint that had been in place for half a century. Staggers Conf. Rep. at 80; *see also* Staggers House Rep. at 115.[18]

Congress had made a start in this direction in 1976; however, the ICC did not follow through on the legislature's deregulatory efforts, and thus 4-R did not stem the decline. *See* Staggers House Rep. at 38. Thus, Congress spoke more clearly, and more forcefully, in the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 [hereinafter Staggers]. In listing fifteen explicit policies for rail transportation, Congress announced in the statute itself that it is the policy of the United States "to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required," 49 U.S.C. § 10101a(2) (1982), and "to reduce regulatory barriers to entry into and exit from the industry." § 10101a(7).[19]

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[18] The House Report makes clear that Congress recognized that excessive regulation was a major contributing factor to the rail industry's decline. *See* Staggers House Rep. at 38, 115.

[19] The Conference Report explained:

> The specific goals of this Act are to assist the industry in the rehabilitation and financing of the rail system; to reform

Staggers eliminated much of the ICC's rate regulation function, leaving a role for the Commission only where necessary to prevent market abuses. *See, e.g.,* Staggers House Rep. at 38-39, 54. More relevant to the case *sub judice,* however, was the Act's deregulation of the field of rail consolidations and acquisitions.

Prior to the enactment of Staggers the ICC's approval process for proposed transfers of rail assets was tedious and cumbersome. *See, e.g.,* 49 U.S.C. §§ 10901, 11341-51. For example, the approval process for proposed minor restructurings could take as long as fifteen months. *See* Staggers Conf. Rep. at 120. Such a delay not only could burden the parties; it actually created disincentives to engage in otherwise economically efficient transactions. In 1980, therefore, Congress exempted certain transactions from regulation by the Commission; however, recognizing that Congress itself was not capable of identifying each of the precise areas that no longer required Commission involvement, Congress granted the ICC broad powers to exempt any transaction from regulation, to be used whenever

> the Commission finds that the application of a provision of this subtitle–

> Federal Regulation to preserve a safe, adequate, economical, efficient and financially stable rail system, to assist the rail system to remain viable in the private sector of the economy; and to provide a regulatory process that balances the needs of carriers, shippers, and the public. The overall purpose of the Act is to provide, through financial assistance and freedom from unnecessary regulation, the opportunity for railroads to obtain adequate earnings to restore, maintain and improve their physical facilities while achieving the financial stability of the national rail system.

Staggers Conf. Rep. at 80.

> (1) is not necessary to carry out the transportation policy of section 10101a of this title; and
>
> (2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

49 U.S.C. § 10505(a) (1982); *see* Staggers Conf. Rep. at 84, 104-05. With respect to acquisitions of rail lines by non-carriers, Congress expressed its intent quite clearly to the Commission:

> For transactions that do not involve the merger or control of at least two Class I railroads, the Commission is *required* to approve an application unless it finds there is a likelihood of substantially lessening competition, creation of a monopoly or restraint of trade and the anticompetitive effects of the transaction outweigh the public interest.

Id. at 84 (emphasis added).

In addition to the explicit direction to the Commission to "actively pursu[e] exemptions" from regulation, Staggers House Rep. at 60, Congress made clear its intent to streamline the regulatory process, and thus to expedite all Commission actions. With regard to exemptions, the ICC was encouraged to adopt an after-the-fact review policy, allowing transactions to proceed forthwith, with Commission review for abuses coming after the transaction is consummated. *See* Staggers Conf. Rep. at 105. And focusing on small, non-major merger transactions, Congress required the Commission to reduce paperwork and to expedite approvals, particularly where such approvals are routinely and consistently granted. *Id.* at 120-21.[20]

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[20] As another example of Congress' desire to reduce regulatory drag, particularly with respect to marginal rail lines, the Commis-

Finally, with regard to labor, Staggers added section 10901(e) to the ICA, giving the Commission the explicit power to impose labor protection, in its discretion.[21] Notably, however, in spite of the deregulatory trend, Congress did not remove any of the procedural protection or substantive rights given to labor by the RLA. In fact, Congress has not made any substantial revisions to the RLA since 1934. *See* ch. 691, 48 Stat. 1185 (1934). We find this Congressional inaction significant.

2.

Plainly, *Ex Parte 392* and the Commission's expedited approval of the sale of P&LE's assets are an outgrowth of this strong congressional policy to remove regulatory burdens and to expedite sales of struggling railroads, as well as the explicit legislative directive to exempt transactions whenever regulation is not necessary. Prior to *Ex Parte 392*, the ICC had routinely granted exemp-

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sion was directed to expedite abandonment proceedings, with specific statutory time limts. *See* 49 U.S.C. § 10904; Staggers Conf. Rep. at 125.

For other discussions of the background, legislative history and purpose of the Staggers Rail Act, see Coal Exporters Ass'n of the United States v. United States, 745 F.2d 76, 80-82 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1072 (1985); Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982).

[21] Section 10901(e) states, in its entirety:

> The Commission may require any rail carrier proposing both to construct and operate a new railroad line pursuant to this section to provide a fair and equitable arrangement for the protection of the interests of railroad employees who may be affected thereby no less protective of and beneficial to the interests of such employees than those established pursuant to section 11347 of this title [pertaining to mergers and consolidations].

49 U.S.C. § 10901(e) (1982).

tions from the requirements of § 10901 to non-carrier acquisition transactions, on a case-by-case basis. In 1985, desiring to "meet the need for expeditious handling of a large number of requests that are rarely opposed," the Commission exempted "substantially all" § 10901 transactions, as a class. *Ex Parte 392*, 1 I.C.C.2d 810, 811-12 (1985).[22] Plainly in line with Congress's goals, and plainly applicable to the sale of P&LE's lines, were the following Commission findings:

> Transfer of a line to a new carrier that can operate the line more economically or more effectively than the existing carrier serves shipper and community interests by continuing rail service, and allows the selling railroad to eliminate lines it cannot operate economically. Transfer before a financial crisis (with attendant plans for abandonment) helps assure continued viable service.

Id. at 813. "The vital interests of shippers, communities, and carriers will be served by this exemption," the ICC found, "because it will result in the continuation of service that might otherwise be lost." *Id.* at 817; *see also id.* ("exemption of these transactions will foster the rail transportation policy of 49 U.S.C. 10101a").

Moreover, the Commission found that "the imposition of labor protective conditions on acquisitions and operations under 10901 could seriously jeopardize the economics of continued rail operations and result in the abandonment of the property with the attendant loss of

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[22] *See also* 1 I.C.C. 2d at 816 ("We conclude that there has been no showing of a benefit from a notice and comment period that outweighs the benefit of expeditious handling. Doing so would be inconsistent with the intent of this class exemption – to streamline current procedures.").

both service and jobs on the line." *Id.* at 813.[23] The agency explicitly found that this was in accord with legislative intent. *Id.* at 814.

We owe great deference to the Commission's interpretation of its own organic statute, particularly when, as here, Congress has "explicitly left a gap for the agency to fill." *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984). Moreover, we think it apparent that the streamlined expedited approval process of *Ex Parte 392* is plainly in accord with the policies discussed *supra* Part IV.A.1. Finally, we have little doubt that railroads like P&LE, on the verge of bankruptcy and having difficulty finding prospective purchasers, are precisely the kind of railroads about which Congress was most deeply concerned, and which Congress was most directly attempting to address, in its deregulatory efforts.[24]

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[23] Of course the Commission left open the possibility of employee protection, upon petition for revocation, "[i]n an extraordinary case." 1 I.C.C. 2d at 815.

[24] The House Report expressed the legislature's concern about the rash of bankruptcies in the industry. *See* Staggers House Rep. at 99. Moreover, the expeditious consummation of transactions involving small and marginal rail lines was plainly a goal of the Act; not only did Congress set express time limits for abandonment procedures, *see supra* note 20, but the Senate, in particular, expressed its concern about the delays in ICC processing of "smaller transactions." *See* Staggers Conf. Rep. at 120; *see also* 49 U.S.C. § 11345 (1982). Finally, Congress expressly desired to permit easier entry into the industry by new carriers, under § 10901, and thus lowered the standard for Commission approval. *See* Staggers Conf. Rep. at 115-16. Previously, approval under § 10901 would only be granted if the public convenience or necessity "require[d] or w[ould] be enhanced" by the new entry; the new law merely requires that the public convenience or necessity "require or permit" the transaction. *Id.*; *see* 49 U.S.C. § 10901(a).

We are thus faced with the ICC's application, in *Ex Parte 392* and in this case, of several related congressional policies: to save marginal rail lines, to encourage the flow of capital into the industry, to eliminate the imposition of costly government-imposed conditions on otherwise efficient transactions, and, perhaps most importantly, to expedite the approval process so that efficient transactions are not derailed by regulatory red tape. To a large extent, the issuance of the status quo injunction is disruptive of these strong policies. Nevertheless, we are confronted by the reality that the issuance of that injunction is fully consistent with an equally strong (and venerable) set of congressional policies – avoiding disruptions in the railroad industry by promoting collective bargaining and preventing strikes – as well as with the express statutory language of an equally valid congressional act – the RLA. The RLA is expressly designed to delay certain management decisions, in order to give rail labor more leverage. Moreover, we find nothing in the language of the Interstate Commerce Act which expressly prohibits the issuance of that injunction.

Unfortunately for the railroad, we find nothing in the more recent ICA that demonstrates a clear congressional intent to eviscerate the plain language of the older RLA, hence unless other factors supersede, we must refuse to accept P&LE's invitation to relieve it of its RLA bargaining duties and to deny the injunction. We now pursue analysis of those other potential factors: (1) an impermissible collateral attack; and (2) ICA preemption.

B. *Collateral Attack*

P&LE, joined by the ICC as intervenor, argues that the union is simply engaging in a forbidden collateral at-

tack on the ICC's order approving the sale transaction. P&LE contends that the ICC has authorized the sale to proceed in an expedited fashion, and that the Commission has determined that the sale would best serve the public interest if it proceeds without labor protection. P&LE claims that by seeking and gaining the district court's injunction against the sale, RLEA has effectively reversed the ICC's order, whereas such a reversal can only be sought in the court of appeals, on petition for review. *See* 28 U.S.C. §§ 2321(a), 2342(5).

Moreover, P&LE claims, the arguments made by RLEA to the district court were the very same arguments the unions made to the ICC. Given that the ICC has already rejected these arguments, by refusing to stay the sale and refusing to order protection for labor, P&LE argues that it was improper for the district court to allow the union to attack collaterally this considered decision by the administrative agency best qualified to address rail transportation issues.

We find these arguments, although appealing, to be ultimately flawed.[25]

We note first that the ICC's order was merely permissive; it authorized the consummation of the sale in its present form, but it did not mandate that the trans-

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[25] Alternatively, P&LE notes that the ICC has not yet definitively denied labor protection, as it still might grant RLEA's petition for revocation and impose retroactive protection for labor. Therefore, P&LE argues, RLEA must first exhaust its administrative remedies, which are still pending, before seeking relief in the courts. This argument, of course, rests on the same premise as the railroad's primary argument, namely, that RLEA is asserting the same rights, and seeking essentially the same relief, in the courts as it asserted and sought before the Commission. Because, as will be shown, we reject this premise, we reject this alternative argument as well.

action be completed. If the ICC had determined that the public interest could *only* be served by the consummation of this sale without any protection for labor, and if the ICC had therefore *required* the sale to proceed forthwith, we might have been faced with a more compelling argument.[26] Had the sale been required, then the unions' efforts to enjoin the sale and to pursue the possibility that labor might gain some protection for itself at the bargaining table might constitute, in effect, an effort to overturn an administrative determination that a delay or collapse of the sale and the imposition of labor protection would harm the public interest. However, that is not this case.

The ICC approved this proposed sale under § 10901, which says that a transaction "*may*" proceed given a finding that the public interest "require[s] *or permit[s]*" the acquisition. 49 U.S.C. § 10901(a) (emphasis added). Thus, the ICC has made no finding that the public interest *requires* this transaction, that the transaction *must* proceed, or that a delay in (or even collapse of) the transaction would *harm* the public interest. Therefore, the district court's injunction does not conflict with the public interest as determined by the ICC's order, because the injunction merely granted a *delay* in the transaction, and the possibility that labor might win

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[26] For example, under section 10905 of the ICA, the Commission has the power to require a railroad to sell its lines to an able purchaser, if the alternative would be abandonment of the lines. A compelling argument could be, and has been, made that a status quo injunction in the face of a 10905 approval would constitute a direct attack on the ICC's determination. *See infra* note 27. In the instant case, however, P&LE has not moved to abandon its lines and subject itself to the forced sale provisions of section 10905; it merely has sought ICC permission.

some protection for itself at the bargaining table.[27]

We are acutely sensitive to P&LE's repeated assertions that a prolonged delay, enforced by the imposition

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[27] In RLEA v. Staten Island R.R. Corp., 792 F.2d 7 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 927 (1987), a decision relied on heavily by P&LE, the Second Circuit found that a similar attempt by RLEA to enjoin the sale pending RLA bargaining constituted a collateral attack on an ICC order authorizing the sale, and therefore the court affirmed the district court's refusal to grant a status quo injunction. The case, however, is clearly distinguishable. The sale of the Staten Island Railroad was approved pursuant to § 10905, rather than § 10901. Section 10905 is a forced sale provision, requiring a financially ailing railroad to sell its assets to a financially responsible purchaser, as an alternative to abandonment of the line under § 10903. The ICC order in that case therefore stated that the seller "*must* complete the sale so long as the buyer consummates." 792 F.2d at 11 (emphasis added). The court therefore held that an injunction against sale could not be granted "without re[s]cission or modification of the ICC's order" mandating the consummation of the sale; such an attack, of course, would only be appropriate on direct appeal from the ICC order. *Id.* at 12.

P&LE argues that the distinction between a mandatory and permissive ICC order has been rejected by the Supreme Court in Venner v. Michigan Cent. R.R. Co., 271 U.S. 127 (1926). The Court there held that the district court was without jurisdiction to enjoin an ICC-authorized transaction for failure to obtain certain state agency approvals. The Court noted that it "makes no difference" that the ICC's order "is not mandatory, but permissive." *Id.* at 131. The case, however, is inapposite, both because the requested injunction truly would have blocked the approved transaction as violative of state law, as opposed to merely delaying the transaction pending the exhaustion of bargaining, *see infra*, and because the case, at bottom, was a federal preemption case, declaring that *state* law could not be used to undermine a transaction once a federal law has preempted the field and a federal agency has passed on the very same issues. *See also* B.F. Goodrich Co. v. Northwest Indus., 424 F.2d 1349, 1354 (3d Cir.), *cert. denied*, 400 U.S. 822 (1970) (reading *Venner* to hold merely that "a permissive order as well as a mandatory one is appealable").

of the "purposely long and drawn out" bargaining procedures of the RLA, *see Detroit & Toledo Shore Line*, 396 U.S. at 149 (quoting *Brotherhood of Ry. & S.S. Clerks v. Florida E. Coast Ry.*, 384 U.S. 238, 246 (1966)), could effectively kill the proposed transaction, and ultimately push the railroad into a bankruptcy proceeding.[28] Far from being unsympathetic to these concerns, we, in fact, recognize that such a result could well be contrary to the strong congressional policy in favor of rehabilitating the railroad industry. This conflict, however, is a consequence of the fact that Congress has not updated an old statute (the RLA) to keep it in tune with newer policies. We, however, are bound by the statute, because we can find no specific congressional intent to rewrite it. We therefore cannot allow our sympathies, our notions of sound policy, or even our practical judgments, to cause us to lose sight of our role – the interpretation and application of a statutory mandate.

There is no doubt that an enforced delay is harmful to management's interest in the case at bar. That, however will always be the case whenever management's proposed change in working conditions is subjected to a status quo injunction. Such a delay is inherent in the RLA bargaining process, and is designed to give labor leverage that it otherwise would lack, and to encourage

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[28] P&LE asserts that as its losses continue to mount, the railroad becomes a continually less attractive acquisition prospect, and that, in fact, the financing for the proposed Railco deal has already become a problem, in part because of the delays engendered first by the strike and now by the injunction. Railco, P&LE asserts, will not wait around forever, and Railco, as amicus, has joined in this argument. Fortunately Railco has remained interested for over six months now, and on two occasions this court has expeditiously reviewed difficult challenges to the district court's action with a view to preventing delay from killing the deal.

compromise that might otherwise not be forthcoming. *See Detroit & Toledo Shore Line,* 396 U.S. at 150; *see also* Part III.B. In short, it is not for us to be concerned about the practical effects of delay on this transaction, when Congress has expressly promoted just such a delay. Although we do not view a judicially-enforced delay as an attack on the ICC's order, we do recognize that Congress has given conflicting signals as to its intent. However, because we are bound to enforce each of the statutes that Congress has written to the fullest extent possible, we believe P&LE's pleas are more appropriately directed to Congress.[29]

P&LE's "collateral attack" argument fails for other reasons, as well. P&LE contends that the district court's order requiring the railroad to bargain over labor protection is inconsistent with the ICC's decision to *deny* labor protection. However, the ICC merely refused to *impose* labor protective conditions on the transaction. RLEA sought and received markedly different relief in the district court: the status quo injunction does not require any substantive protection for labor; it merely requires that the parties bargain, a process which may well produce no substantive agreement.[30]

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[29] Of course, to the extent the railroad would like us to view this situation "practically," we must note that practicality can cut both ways. We have no doubt that the unions are aware of the finanical plight of the railroad, and if not, that the railroad is quite capable of presenting the stark facts to the unions, at the bargaining table. There simply is no support in the record for P&LE's insinuation that the unions are motivated by a perverse desire to destroy the enterprise rather than to secure what is best for their members. We therefore refuse to presume that the unions will intentionally force the railroad into bankruptcy, a result that would benefit no one.

[30] *See supra* Part I.A. for a description of the largely "conciliatory" RLA bargaining process.

The imposition of substantive labor protection on a transaction is a somewhat unusual remedy in American labor law; the much more common approach to the protection of labor's interests has generally been to impose bargaining and procedural obligations, rather than to impose upon the parties substantive resolutions to major labor disputes.[31] The mere fact that a government agency has refused to impose an economic solution on a private labor dispute does not imply that the agency has refused to allow the parties themselves to bargain for and reach an agreement. It merely means that the agency has determined that the consummation of the transaction without labor protection would not be so extraordinarily unfair, when balanced against the benefits of the transaction, as to require government-induced substantive protection.

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[31] *See, e.g.*, RLA § 2 First, 45 U.S.C. § 152 First (1982) ("It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements . . . and to settle all disputes arising out of the application of such agreements. . . ."); NLRA § 1, 29 U.S.C. § 151 (1982) ("Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury. . . ."); *id.* ("the policy of the United States [is to] . . . encourag[e] the practice and procedure of collective bargaining"); NLRA § 8(d), 29 U.S.C. § 158(d) (1982) (it shall be an unfair labor practice to refuse to "confer in good faith with respect to wages, hours, and other terms and conditions of employment").

For a dicussion of typical substantive labor protective conditions traditionally imposed by the ICC, see New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979). *See also* 49 U.S.C. § 11347 (1985) ("The arrangement [for the protection of employees] and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the [Commission order]"). The provisions are mandatory with respect to mergers, but discretionary with respect to acquisitions by non-carriers. *See* § 10901(e).

The dissent points out that Congress has chosen to make labor protection in § 10901 transactions discretionary rather than mandatory. *See* Dissenting Typescript at 5-6. We agree, however we do not see how this is inconsistent with our decision. We are not reversing the ICC's decision not to impose labor protection under the ICA (nor could we, even if we chose to do so, given the procedural posture of this case). We are merely enforcing a bargaining order under the *RLA*, a separate and equally important federal statute.

Moreover, any protective concessions won by the unions as a result of the RLA-imposed process do not necessarily conflict with the lack of protection imposed by the ICC. Such bargained-for concessions may be substantially less burdensome to the railroad than the typical substantive conditions imposed by the Commission. Put differently, the enforcement of the union's procedural rights should not be viewed as an attack on the ICC's determination that burdensome substantive protections would be detrimental to the public interest. Nevertheless, P&LE insists that RLEA's complaint constitutes a collateral attack because the injunction, in essence, blocks the sale, by giving the union a practical veto power over the ICC-approved transaction.[32] The

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[32] The railroad supports its argument that the union has been given a veto over the sale by attempting to demonstrate to us that the unions' real motive is to block the sale to Railco and instead force a sale to the union. We, of course, intimate no view on this question of fact. However, we do note that the appropriate way for the railroad to present this argument would be as a challenge to the union's good faith in trying to reach agreement over the effects of the transaction. The union, like the employer, has an obligation under § 2 First of the RLA "to exert every reasonable effort to make and maintain agreements." 45 U.S.C. § 152 First. Once the RLA bargaining process is underway, the railroad is free to

argument, however, misconstrues the nature of the injunction. More importantly, the argument is essentially a disguised attack on the RLA itself.

The injunction does not block the sale, it merely delays it (albeit for longer than P&LE might be able to afford). Once the parties have exhausted the RLA remedies, if no agreement has been reached, the status quo obligation is lifted. Moreover, the injunction does not give the unions a veto power over the sale; it merely promotes the possibility of a mutually agreeable solution, by fostering the bargaining process. To the extent that P&LE is unhappy with this enforced delay, and its concomitant duty to bargain, P&LE is not simply defending the integrity of an ICC order; it is attacking the major premise of the RLA itself. *See supra* Part I.A. Such an attack, although we are sympathetic to it, is more appropriately directed to Congress than to the courts.

C. *Preemption*

P&LE contends that the Interstate Commerce Act, as administered by the Interstate Commerce Commission, has preempted the field of labor protection in rail transportation transactions. Any duty to continue operating its rail lines pending exhaustion of the RLA bargaining process, argues P&LE, is inconsistent with the ICC's plenary authorization of the expeditious con-

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challenge the union's good faith in the appropriate forum. That challenge, however, is currently premature.

We therefore also reject the railroad's contention that the district court improperly granted summary judgment in spite of outstanding disputed issues of fact. We do not view the questions of the union's underlying motives, or any of the other purportedly disputed issues of fact raised by P&LE in its brief, to be material to the availability of a status quo injunction.

summation of the sale to Railco. Given the "inherent and obvious conflict between the ICC's jurisdiction and an effects bargaining obligation," P&LE argues that "the inconsistent requirements of the RLA must yield" to the superior and expansive authority of the ICC under the ICA. Brief of Appellant at 42. *See Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318, 321 (1981) (the ICA "is among the most pervasive and comprehensive of federal regulatory schemes;" the "exclusive and plenary nature of the Commission's authority to rule on carriers' decisions to abandon lines is critical to the congressional scheme, which contemplates comprehensive administrative regulation of interstate commerce"). We disagree with P&LE's argument.

We readily acknowledge the significant tension between the means used by the two statutes to achieve similar statutory ends, namely, to protect and promote interstate rail transport. The RLA, in an effort to prevent strikes, imposes a regulatory structure on the parties, forcing them to forgo any unilateral action pending exhaustion of a lengthy process. In contrast, the ICA, as currently administered by the ICC and in an effort to prevent failures and abandonments, removes regulatory burdens and favors an expeditious process. However, if at all possible (and we believe that it is possible), we have an obligation to read the two statutes in harmony, avoiding unnecessary conflict, for it is clear that repeals by implication are heavily disfavored. *See Watt v. Alaska*, 451 U.S. 259, 266-67 (1981).[33] Moreover,

[33] The Court in *Watt* made clear that when called upon to interpret two statutes which, on their face, appear to conflict, it would be guided by the "maxim: 'repeals by implication are not favored.' . . . 'The intention of the legislative to repeal must be "clear and manifest." ' . . . We must read the statutes to give effect to each if

even if we were to find a direct conflict between the mandates of these two venerable and comprehensive statutory schemes, it is unclear that it is the ICA which should preempt the RLA.[34]

The RLA has been on the books, unchanged for our purposes, for over half a century. We are wary of surmising about legislative intent, or inferring too much from legislative inaction. Yet we cannot help but note that Congress, in spite of its apparent and extensive efforts to deregulate the rail industry, has not seen fit to deregulate, or even to streamline, the bargaining process that has governed the industry for so long. Congress has made the legislative determination to deregulate the rail industry by removing many administrative burdens, but even while focusing on deregulation Congress chose not to modify the cumbersome procedures of the RLA. Given these recent legislative efforts in the area, it would be inappropriate for us to act where Congress has chosen not to act.

Moreover, we do not find the effect of the RLA to be as inconsistent with the ICC's jurisdiction and action as P&LE claims. P&LE claims that the ICA presents a detailed and comprehensive regulatory scheme, and that therefore labor should not be allowed to assert rights contrary to the public interest as determined by the ICC. Yet even if an ICC decision to deny labor protection reflects more than merely a decision by the ICC

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we can do so while preserving their sense and purpose." 451 U.S. at 267 (citations omitted).

[34] We find the Supreme Court's decision in *Kalo Brick*, 450 U.S. 311, to be of no import here. That case declared that ICC action preempts all inconsistent state laws, because the federal government has exclusive jurisdiction over interstate commerce, when it elects to exercise it. The case gives no indication of the ICC's authority with respect to potentially inconsistent federal laws.

that labor protection is not *necessary* to protect the public interest, *see supra* Part IV.B., it plainly is a decision made from a perspective on the public interest very different from that of the RLA.

The ICC's perspective, and in fact its mandate, is to focus on national transportation policy, and to foster an efficient and effective rail transportation system. *See* 49 U.S.C. § 10101a.[35] Section 10101a, quoted in the mar-

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[35] Section 10101a, in its entirety, states:

> In regulating the railroad industry, it is the policy of the United States Government–
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> (1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;
>
> (2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;
>
> (3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Interstate Commerce Commission;
>
> (4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;
>
> (5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;
>
> (6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;
>
> (7) to reduce regulatory barriers to entry into and exit from the industry;
>
> (8) to operate transportation facilities and equipment without detriment to the public health and safety;
>
> (9) to cooperate with the States on transportation matters to assure that intrastate regulatory jurisdiction is exercised in accordance with the standards established in this subtitle;

gin, lists fifteen distinct policies upon which the ICC must focus. Of the subsections relevant to this transaction (§ 10101a(1)-(5), (7)-(8), (12), and (14)), it is plain that only one directs the ICC's attention to the interests of labor, *viz.*, § 10101a(12). Each of the other policies directs the ICC to promote competition, efficiency, and service, and to remove regulatory impediments. It is plain that the interests of labor are, at best, only a relatively small concern of the ICC. We therefore find it highly unlikely that Congress intended that rail labor look to the ICC as its sole source of protection. We find it much more likely that Congress directed the ICC to concern itself with rail labor's interests only to the extent necessary to maintain and promote an adequate and efficient rail transportation system, while leaving the RLA intact as the mechanism for labor to assert its own interests. *See RLEA v. P&LE*, 831 F.2d at 1235 ("Nothing in the statutory language [of the ICA] suggests that this incidental reference to 'fair wages' [in

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(10) to encourage honest and efficient management of railroads and, in particular, the elimination of noncompensatory rates for rail transporatation;

(11) to requires rail carriers, to the maximum extent practicable, to rely on individual rate inceases, and to limit the use of increases of general applicability;

(12) to encourage fair wages and safe and suitable working conditions in the railroad industry;

(13) to prohibit predatory pricing and practices, to avoid undue concentrations of market power and to prohibit unlawful discrimination;

(14) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information; and

(15) to encourage and promote energy conservation.

49 U.S.S. § 10101a.

§ 10101a(12)] converts the regulatory scheme over rail transport into a labor law.").

We find support for this proposition in the case of *United States v. Lowden*, 308 U.S. 225 (1939), in which the Supreme Court approved the ICC's discretionary imposition of labor protection on railroad consolidations, even without explicit statutory authorization. The Court discussed the purpose of such protective measures:

> It is thus apparent that the steps involved in carrying out the Congressional policy of railroad consolidation in such manner as to secure the desired economy and efficiency will unavoidably subject railroad labor relations to serious stress and *its harsh consequences may so seriously affect employee morale as to require their mitigation both in the interest of the successful prosecution of the Congressional policy of consolidation and of the efficient operation of the industry itself,* both of which are of public concern within the meaning of the statute.

Id. at 233 (footnote omitted) (emphasis added); *see also id.* at 238. Plainly, the Court viewed these measures as a means of implementing the ICA's concern for the health of the industry and not its concern for the interests of labor *qua* labor.[36]

We also note that the ICC's own explanation for a recent decision to deny labor protection is fully consistent

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[36] The *Lowden* Court also appeared to contemplate, without any hesitation, the coexistence of the labor protective powers of the ICC and the dispute resolution mechanisms of the RLA. *See* 308 U.S. at 233 n.2, 235-36 (citing 43 Monthly Lab. Rev. 867 (1936) (union invokes services of National Mediation Board, pursuant to RLA § 6, to procure agreement on job protection resulting from rail consolidations)).

with our assessment of its perspective. Because the case constitutes the best available evidence of the Commission's thought processes in deciding whether to impose labor protection, we discuss it in some detail. In *Northwestern Pacific Acquiring Corp. & Eureka Southern R.R. Co.–Exemption From 49 U.S.C. 10901 and 11301*, Finance Docket No. 30555 (Dec. 22, 1987), the Commission, in an extended court-mandated discussion, explained its decision to deny RLEA's request for labor protection. Although it admittedly was not persuaded that the harm to labor was as great as the union claimed (because many workers would retain their jobs with the acquiring railroad, and the alternative might be abandonment and loss of all jobs), it made clear that its primary concern was with promoting rail transportation, and not with protecting labor's interest.

The Commission recognized that labor protection would tend "to encourage fair wages and safe and suitable working conditions," *see* § 10101a(12), yet it nevertheless found that imposition of such protection would generally "burden the selling carrier and frustrate the statutory mandate to foster sound economic conditions in transportation." *Northwestern Pacific* at 3. The Commission emphasized the harsh financial burden that protection would impose on the carrier, and the possibility that the burden would be so great as to cause the sale to collapse. *Id.* at 4, 7, 13. Its concern was with "the public interest overall," in spite of any "adverse impacts on affected employees." *Id.* at 11.

Ultimately, the Commission made clear that its "principal goal" was to ensure that "service over the line continues." *Id.* at 4 n.9. " '[A]lthough individual employees are the primary beneficiaries' " of any labor protection, " 'their interests are secondary to promoting the welfare of the national transportation system.' " *Id.* at 5

n.10 (quoting *CMC Real Estate Corp. v. ICC*, 807 F.2d 1025, 1038 (D.C. Cir. 1986) (quoting *Simmons v. ICC*, 697 F.2d 326, 335 (D.C. Cir. 1982))).

We have little difficulty in concluding that Congress relegated labor's interest to only an incidental concern of the ICC, because we think it clear that Congress has enacted equally trenchant yet separate legislation to deal with the unique problems of labor in the rail transportation industry, legislation which Congress intended to coexist with (rather than play second fiddle to) the ICA. *Cf. RLEA v. P&LE*, 831 F.2d at 1236 ("The ICC's authority to consider the incidental effect of the transaction on labor and its discretionary authority to require provisions that protect employees do not make the Interstate Commerce Act comparable to the Railway Labor Act, which contains a comprehensive scheme of alternative dispute resolution mechanisms."). Moreover, the ICC itself has recognized that it lacks "expert competence" in the field of labor-management relations. *Leavens v. Burlington Northern, Inc.*, 348 I.C.C. 962, 975 (1977); *accord Brotherhood of Locomotive Eng'rs v. Chicago & N.W. Transp. Co.*, 366 I.C.C. 857, 861 (1983).[37] We cannot agree with P&LE that Congress intended that rail labor look for its sole protection to an agency that lacks expertise in this field.[38] We therefore

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[37] In *Leavens*, the ICC refused to resolve a dispute arising out of employee protective conditions that the Commission had imposed, because the claimed injury did not stem directly from the approved merger. In its ruling, the Commission noted that its "responsibility to impose protective conditions in a merger was not meant to give the Commission a right to interfere in the normal give and take of collective bargaining." 348 I.C.C. at 976.

[38] Judge Sloviter, writing for the court in the earlier appeal of this case, recognized that if the railroad is not required to submit to " 'extensive negotiations and bargaining,' RLEA and the

cannot agree, without a clearer expression of congressional intent, that the ICC's exclusive jurisdiction over the proposed transaction preempts any potentially inconsistent RLA duties.

We recognize that, to some extent, the policy of the RLA is congruent with the policy of the ICA; both acts reflect a congressional desire to keep the rails running. However, whereas the ICA's focus is on promoting competition and efficiency, *see* § 10101a(1)-(5), the RLA's focus is on preventing strikes, *see Detroit & Toledo Shore Line*, 396 U.S. at 148-49 & n.13; 45 U.S.C. § 151a(1). To the extent that we should be concerned about the effect of a strike by P&LE's unions on the continuation of rail service,[39] the ICC has no power to prevent a strike, *see RLEA v. P&LE*, 831 F.2d 1231 (3d Cir. 1987); only a bargaining order under the RLA can ensure that labor will not engage in a work stoppage. *See Detroit & Toledo Shore Line*, 396 U.S. at 150 ("immediate effect [of the status quo requirement] is to prevent the union from striking and management from doing anything that would justify a strike"). The status quo obligation is central to the design of the RLA, *id.*,

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employees it represents would be relegated to 'a small voice of protest' " at the ICC. PLEA v. P&LE, 831 F.2d at 1237 (quoting Texas & N.O. R.R. Co. v. Brotherhood of R.R. Trainmen, 307 F.2d 151, 158 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963)). We do not believe that this was Congress' intent.

[39] P&LE has asserted that a "strike and other picketing activity by P&LE's unions will disrupt P&LE's operations and result in their shutdown, causing irreparable injury to P&LE and injury to P&LE's shippers, its employees and the economies of the communities served by P&LE." P&LE's Verified Counterclaim ¶ 13, J.A. 11, 14. *See also* Affidavit of James D. Peters, P&LE's Director of Labor Relations ¶¶ 18, 19, J.A. at 24, 27 (strike has interrupted, and if not enjoined will continue to interrupt, P&LE operations).

and we therefore are particularly reluctant to find preemption of that obligation without a clearer expression of congressional intent.

Furthermore, we are not even certain that preemption is truly necessary to comport with the national transportation policy. Congress was willing to streamline the regulatory process in Staggers because it found that process to be counterproductive, in that regulatory "drag" was largely responsible for the ailing condition of the rail industry, while such regulation was producing little countervailing benefit.[40] The bargaining process that is furthered by the status quo injunction, however, plainly does have countervailing benefits, not the least of which is the avoidance of strikes during the pendency of bargaining. Reasonable people can differ about how to weigh the advantages of labor peace on a failing railway, when compared to the benefits of an expeditious influx of new capital into P&LE's rail lines. However, such a policy balance is not for us to make. We read the RLA to express a congressional policy in favor of labor peace (and its corollary benefits of labor leverage at the bargaining table), even at the expense of substantial cost to management. We therefore are not at all certain that some delay in the consummation of the proposed sale is inconsistent with national transportation policy, which merely favors the removal of regulatory restraints when they are plainly counter-

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[40] Moreover, Congress, in Staggers, gave no indication that it was disenchanted with labor regulation. Congress focused its deregulatory efforts on artificial barriers to entry, unnecessary price controls, and excessive red tape, but did not remove any of the regulatory structure affecting labor-management relations in the rail industry. *See generally* H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Admin. News 4110.

productive. We are not prepared to say that the restraints imposed by the RLA are comparable to the regulatory burdens removed by Staggers. Moreover, we note that the labor peace guaranteed by the RLA is surely congruent with the goals of national transportation policy and the ICA, because labor peace is arguably essential to keep the rails running. *See supra* note 39.

P&LE, however, argues that we should defer to the views expressed by the ICC, as intervenor and in prior administrative decisions, that RLA requirements are superseded by an ICC order exempting a transaction from regulation. *See Chevron, U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837, 844 (1984) ("considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer") (footnote omitted). We, however, think it is sufficient to note that the ICC has not been charged with the administration of the RLA, nor has it had occasion or power to rule on an RLA bargaining question. We therefore find deference inappropriate in this case.

Finally, we note that P&LE, in its brief to this court, has presented an impressive number of cases that it claims point unerringly in the direction of the preeminence of the ICA. We fully concede that the trend in the caselaw has been to diminish the delaying effect of the RLA in cases where the ICC has approved the expeditious consummation of a transaction. We, however, believe ourselves powerless to ignore the mandate of the RLA, in spite of any contrary trend in the caselaw and in public policy. Moreover, we find each of the court of appeals cases distinguishable. We will discuss briefly the two cases which we find most closely analogous.[41]

[41] See also *supra* note 27, for a discussion of RLEA v. Staten Island R.R. Corp., 792 F.2d 7 (2d Cir. 1986), *cert. denied,* 107 S. Ct.

In *International Association of Machinists v. Northeast Airlines*, 473 F.2d 549 (1st Cir.), *cert. denied*, 409 U.S. 845 (1972), an examiner for the Civil Aeronautics Board ("CAB") had approved a merger between Northeast and Delta Airlines.[42] One of Northeast's unions sought an injunction to stop the sale, pending bargaining over the effects of the merger under the RLA.[43] The district court denied the injunction, and the court of appeals affirmed, holding that Northeast had no duty to bargain over the effects of a merger subject to CAB approval. However, the court explicitly relied on three factors that are not present in the instant dispute, and that the court found made that case particularly inappropriate for injunctive relief.

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927 (1987), the case relied on most heavily by P&LE. *Staten Island* was followed blindly, and we believe incorrectly, by a number of district courts faced with distinguishable factual situations. *See, e.g.*, United Transp. Union v. Burlington Northern R.R., 672 F. Supp. 1579 (D. Mont. 1987); RLEA v. Chicago & N.W. Transp. Co., 124 L.R.R.M. (BNA) 2715 (D. Minn.), *appeal docketed*, No. 87-5071-MN (8th Cir. 1987); RLEA v. City of Galveston, No. G-87-359 (S.D. Tex., Nov. 4, 1987); Decker v. CSX Transp., Inc., No. CIV- 87-1147C (W.D.N.Y. Nov. 3, 1987). The dissent cites some of these as well as other cases for the proposition that, "[u]ntil today, the judiciary has not tolerated collateral attacks on ICC-approved abandonments." Dissent Typescript at 7. To the extent that the cases cited by the dissent involved genuine collateral attacks on ICC orders, we agree with the non-controversial proposition that such attacks are not allowed. We believe, however, that this begs the question presented here, because, as we have exhaustively demonstrated, RLEA's request for an RLA status quo injunction does not constitute such a collateral attack.

[42] The CAB's jurisdiction over airline mergers and acquisitions was roughly comparable, for our purposes, to the ICC's jurisdiction over rail transactions. *See* 49 U.S.C. § 1378 (1982).

[43] The major dispute resolution procedures of the RLA are made applicable to the airline industry by 45 U.S.C. § 181 (1982).

First, the court found no significant harm to the union in denying the injunction (when compared to the harm to the airline in delaying the merger), because the CAB examiner had already proposed "[e]xtensive labor protective provisions." 473 F.2d at 553. P&LE's unions have been granted no comparable protection. Second, in balancing the equities, the court found that the union itself had "enhanced the danger" that the deal would collapse, by delaying its demand for negotiations for several months. *Id.* at 554. No such delay is claimed in our case.

Finally, the court noted that, "[p]ossibly were the need for negotiation compelling, we would feel differently." *Id.* at 559. However, the court found that "Delta's employees, who would have no opportunity to participate, could be injured by whatever benefits NE's employees secure in premerger negotiations with their own employer," and therefore the court found that "need points both ways." *Id.* Railco, as a newly-formed carrier, has no employees who could be burdened by any protection won by RLEA at the bargaining table, and thus P&LE's employees' "need for negotiation" is significantly more compelling.[44]

More recently, the First Circuit again found for the employer in a similar dispute. In *Brotherhood of Locomotive Engineers v. Boston & Maine Corp.*, 788 F.2d 794 (1st Cir.), *cert. denied*, 107 S. Ct. 111 (1986),

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[44] We note, moreover, that we are unsure whether the First Circuit's decision to "balance the equities" to determine whether a status quo injunction should issue, was appropriate. It is far from clear that the availability of the injunction *vel non* is a matter of equitable discretion; in fact, the language of the RLA sounds quite mandatory. *See, e.g.*, 45 U.S.C. § 156 (1982) ("rates of pay, rules, or working conditions *shall not be altered* by the carrier") (emphasis added).

the ICC had approved the defendant's decision to lease certain track rights to another railroad. The union demanded that the railroad bargain over the consequential reduction in jobs. The court recognized that the union had raised a major dispute, *id.* at 798-99, but refused to enjoin the transaction. The court, however, relied explicitly on the ICC's express, self-executing power to exempt the transaction "from all other law" under 49 U.S.C. § 11341(a). 788 F.2d at 800-01. This section, by its terms, is applicable only to transactions involving "combinations," and not to acquisitions by non-carriers. *See* 49 U.S.C. § 11341(a). P&LE's proposed sale, in contrast, was approved by the ICC under § 10901 as a non-carrier acquisition.[45] We therefore find no court of appeals case on point that persuades us to reverse the injunction.

D. *Summary*

Congress has plainly expressed a policy in favor of expedited approvals of rail acquisitions, particularly in cases of marginal rail lines. The ICC, in furtherance of this sound policy, has given Railco and P&LE permission to proceed with their proposed transaction. The Commission, in its discretion has chosen not to impose substantive labor protective conditions upon the parties to the transaction. However, in spite of these strong administrative efforts to further congressional policy, we do not find, in either that policy or the ICC decisions, either an intent to override or an irreconcilable conflict with the statutorily mandated procedures of the RLA, and thus we cannot relieve the railroad of its statutory obligation to bargain and maintain the status quo. The

[45] We therefore express no view on the power of the ICC to relieve a carrier of its RLA duties, pursuant to § 11341(a).

railroad's obligation to bargain with its unions prior to completing the sales does not conflict with the ICC order because the ICC has simply made the determination that the public interest would "permit" the consummation of the sale, and that the effects of the sale, from the perspective of the transportation-oriented ICC, are not so extraordinarily unfair as to require government-imposed substantive labor protection. Although there is undoubtedly a strong tension between the policy of the newer act and the mandate of the older one, and although the consequence of the imposition of this older statutory mandate may be the destruction of P&LE's business, we are constrained to reconcile the two laws and to allow RLEA to attempt to use its leverage at the bargaining table.

V. CONCLUSION

We are fully aware of the unfortunate ramifications and irony of our decision. A bargaining order, and a status quo injunction, designed to foster conciliation, promote labor peace, and ultimately keep the rails running, may ultimately have the perverse effect of destroying the only chance P&LE has for survival and perhaps even the very jobs that the unions are now trying to protect. Although we are not happy with this result, we feel constrained to reach it, because the Supreme Court has appropriately admonished the judiciary not to apply its own brand of "common sense" in the face of a contrary statutory mandate. *See TVA v. Hill*, 437 U.S. 153, 193-95 (1978).[46]

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[46] In *Hill*, plaintiffs had sought an injunction against the completion of the multi-million dollar Tellico Dam, because such completion would probably destroy the snail darter's "critical habitat," and endanger its continued existence as a species, in violation of the

We recognize, of course, that the statutory mandate is in tension with more recent congressional policies. However, we do not feel free to translate those abstract policies into a repeal of a black-letter law. If we have misinterpreted congressional intent, we can only hope that Congress speaks more clearly and consistently quite soon. As we explained in *Superior Oil Co. v. Andrus,* 656 F.2d 33 (3d Cir. 1981), " '[i]t is our judicial function to apply statutes on the basis of what Congress has written, not what Congress might have written.' " *Id.* at 41 (quoting *United States v. Great Northern Ry.*, 343 U.S. 562, 575 (1952)). If the statute places a greater burden on a party than we feel fair, it is Congress's function, not the court's, to readjust that burden. *Id.*

We nevertheless will urge the National Mediation Board, to the extent it is within the Board's powers, to minimize the burden on the railroad, if possible. The Board's ultimate goal, of course, should be to promote conciliation and possibly agreement.[47] Naturally, as

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Endangered Species Act of 1973, 16 U.S.C. §§1531-43. The court was "urged to view the Endangered Species Act 'reasonably,' and hence shape a remedy 'that accords with some modicum of common sense and the public weal.' " 437 U.S. at 194 (citation omitted). However, the court responded: "is that our function? We have no expert knowledge on the subject of endangered species, much less do we have a mandate from the people to strike a balance of equities on the side of the Tellico Dam." *Id.* Citing the importance of separation of powers, the Court refused to make an equitable judgment that a statutory mandate makes no sense. That, the Court held, was for the political branches. *Id.* at 194-95.

Ultimately, Congress granted the relief to the dam that the Supreme Court denied in *Hill,* "but it did so in a fashion that could not have been tailored by the courts." *Board of Governors v Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986).

[47] Section 6 of the RLA expressly requires the parties to a major dispute to submit to mediation upon the request of either party, or

long as this continues to be a reasonable possibility, the Board should conduct itself in the usual manner and refrain from releasing the parties from mediation. However, this need not become an "interminable" process.[48] We would hope that the Board, in deference to the plight of the railroad, and to the competing congressional policy favoring expedited regulatory approvals, would streamline its procedures to the extent possible and not keep the parties in mediation any longer than absolutely necessary. When progress is no longer forthcoming, we would hope that the Board would release the parties, forthwith.[49] In sum, it would seem that this case need not require the "purposely long and drawn out" approach of more typical major railway disputes, that such delay runs counter to the public interest, and,

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upon the proffer of the National Mediation Board. 45 U.S.C. § 156. The function of the Board in a major dispute is described in section 5 First, 45 U.S.C. § 155 First (1982). *See also Brotherhood of Railroad Trainmen*, 394 U.S. at 378, discussed *supra*, Part I.A.

[48] Moreover, we doubt, given the rail transportation policies expressed in Staggers, that Congress would intend that this particular process be "interminable," though there is no evidence that Congress has focused on the question.

We also note that, to the extent the delay inherent in the RLA bargaining process is harmful to the railroad's interests, the railroad is not totally powerless to release itself from the constraints of the injunction. Although the injunction necessarily conflicts with immediate consummation simply because the sale cannot be completed until the terms of the injunction have been satisfied, i.e., until the railroad reaches agreement with its unions or the parties exhaust the bargaining procedures, we note that the consummation of the sale need not necessarily await release from mediation by the Board. It is, after all, open to P&LE to reach agreement with its unions, thus releasing itself from the strictures of its status quo obligation.

[49] Presumably, the Board would still proffer arbitration in accord with section 5 First of the RLA, 45 U.S.C. § 155 First.

in fact, that congressional intent might well require something much more expeditious.[50]

The order of the district court will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

/s/ EDWARD R. BECKER
Circuit Judge

Dated:

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[50] Good faith bargaining under the NLRA need not be an interminable process. The Mediation Board, in its efforts to mediate with an eye toward expedition, might wish to borrow from NLRA principles, and stand ready to find an impasse between the parties more readily than normal. *See, e.g.*, E.I. duPont de Nemours & Co., 268 N.L.R.B. 1075, 1076 (1984) (NLRB need not be reluctant to find impasse, when further bargaining would be futile). For a discussion of factors approved by this court in determining whether impasse has been reached, see Saunders House v. NLRB, 719 F.2d 683, 687 (3d Cir. 1983), *cert. denied*, 466 U.S. 958 (1984).

Although we urge the Mediation Board to look to the NLRA for guidance in its efforts to expedite the process, we note that we do not go as far as we might have, had we found a clearer intent to relieve the railroad of its RLA duties. Where such an intent can be found, at least one court has shown a willingness to streamline the RLA process. In Brotherhood of Railway, Airline and Steamship Clerks v. REA Express, 523 F.2d 164 (2d Cir.), *cert. denied*, 423 U.S. 1017 (1975) & 423 U.S. 1073 (1976), the court concluded that a debtor-in-possession under the old Bankruptcy Act was technically a new employer, and therefore not subject to the same statutory strictures that would have hindered its predecessor. The court therefore held that, given that the employer was "teetering on the brink of disaster," it need not comply with the "elaborate and protracted" RLA procedures. *Id.* at 171. Rather, the court allowed the debtor merely to "negotiate in good faith for a reasonable length of time," prior to implementing a unilateral reduction in operations. *Id.* Unfortunately, however, the ICA, unlike the Bankruptcy Act, does not impose its own set of elaborate procedural requirements on a rail employer in order to protect it from economic disaster. P&LE is therefore constrained to comply with the RLA.

RAILWAY LABOR EXECUTIVES' ASSOCIATION

v.

PITTSBURGH & LAKE ERIE RAILROAD COMPANY

No. 87-3797

HUTCHINSON, *Circuit Judge,* dissenting.

The difficulties of statutory exegesis with which the opinion for the court struggles are common and all too real in statutes affecting politically and economically potent interest groups. The understandable institutional constraints imposed on the political branches of our tripartite government often leave an ambiguous no-man's land of conflict between different statutes affecting the same parties. As the opinion for the court recognizes, it is nevertheless our task to reconcile the differences between the statutes, if possible, and when their terms are irreconcilable, to determine as best we can the intent of Congress. *See TVA v. Hill,* 437 U.S. 153, 193-94 (1978); *Superior Oil Co. v. Andrus,* 656 F.2d 33, 41-42 (3d Cir. 1981).

I believe the result the court reaches directly contravenes the Staggers Act. Therefore, I respectfully dissent. The court's opinion shows its distaste for the effects of its decision in a real world of a weakened and contracting rail industry. It nevertheless concludes that Congress's failure to provide an express waiver of the RLA's protracted dispute resolution procedures for ICC-approved sales of railway line to non-carriers requires courts to let those lines bleed away their resources in a continuing *status quo* while hope of preserving any service, or any jobs, seeps away. I believe the RLA and the ICA are inherently contradictory in this respect and that Congress intended the ICA to prevail.

The Supreme Court has established a company's right to sell its business without having to bargain over the

decision to do so. *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 686 (1981). When that decision is made primarily for economic reasons, and labor concessions can only have an incremental impact, mandatory bargaining is not required. The large, ongoing losses the record shows P&LE suffers under the *status quo* threaten its impending bankruptcy. That fact distinguishes *Order of R.R. Telegraphers v. Chicago and North Western Rail Co.*, 362 U.S. 330 (1960). In *Telegraphers* the railroad sought only to abandon several stations and consolidate its operations. The union sought bargaining under § 6 of the RLA to amend the collective bargaining agreement by adding a new provision requiring the railroad to bargain over discontinued jobs. The Supreme Court held that the union was entitled to strike in order to compel bargaining and could not be enjoined from doing so under the Norris-LaGuardia Act.

Unlike *Telegraphers*, this case involves the sale of an entire rail system to a new carrier under the ICA with ICC approval. The court imposes a mandatory bargaining restraint on the decision to sell, in conflict with the Supreme Court's bright line rule in *First Nat'l Maintenance Corp.* A *status quo* requirement contradicts the ICC's approval of the sale of the P&LE to Railco and makes that approval obsolete. There is a distinction between allowing a union to exert economic pressure on the employer, by invoking Norris-LaGuardia's prohibition on injunctions against strikes, and ordering mandatory bargaining in opposition to the ICC's statutory authority under the ICA.

The imposition of RLA *status quo* bargaining destroys the entire ICA scheme for the expedited sale of ailing railroads to new carriers. Recent amendments to the ICA demonstrates Congress's conclusion that the railroad industry was "overregulated" and that this

excess regulation was a substantial factor in causing the industry to fall behind in competition with other types of transportation. Convinced that changes were needed in order to save a failing industry, Congress enacted the 4-R Act and the Staggers Act of 1980 to streamline rail regulation.

Under the ICA, as so amended, Congress has provided the ICC with fifteen policies to guide the Commission in regulating the rail industry. 49 U.S.C. § 10101a. Congress sought to restore, maintain and improve the physical and financial soundness of the rail industry, and create "a regulatory process that balances the needs of carriers, shippers, and the public." Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, § 3; *see* U.S.C.A. § 10101a (historical note). The Supreme Court has recognized that the needs of these various interests, including labor, must be balanced with the need to keep the railroads running. *Chicago and North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 321 (1981). Prohibiting the sale and maintaining the *status quo* until RLA bargaining procedures are exhausted largely ignores all but one of the fifteen factors, viz: labor interests.

Under the ICA, the ICC has exclusive jurisdiction over transportation by rail carriers. 49 U.S.C. § 10501(d).[1] In contrast to the mandatory provisions for other rail transactions, such as abandonments, the imposition of labor protective conditions in the sale of railroad lines to new carriers was left by Congress to the ICC's discretion:

> The Commission may require any rail carrier proposing both to construct and operate a new railroad line pursuant to this section to provide a fair and equitable arrangement for the protection of the in-

[1] State authorities also have exclusive jurisdiction over rail carriers to the extent authorized under the ICA. 49 U.S.C. § 10501(d).

> terests of railroad employees who may be affected thereby no less protective of and beneficial to the interests of such employees than those established pursuant to section 11347 of this title.

49 U.S.C. § 10901(e). *See RLEA v. United States*, 791 F.2d 994 (2d Cir. 1986) (ICC has discretion under § 10901 to impose labor protective conditions); *RLEA v. ICC*, 784 F.2d 959 (9th Cir. 1986) (courts agree ICC has discretion within § 10901 to impose labor protective conditions in acquisition by non-carrier); *Black v. ICC*, 762 F.2d 106 (D.C.Cir. 1985) (labor protective conditions are mandatory for § 11343 of ICA and discretionary for § 10901); *RLEA v. ICC*, 735 F.2d 691 (2d Cir. 1984) (in passing Staggers Act Congress intended to retain ICC's traditional policy of not imposing mandatory labor protective conditions on entire line abandonments, even though mandatory language of § 10903 appeared to apply); *RLEA v. United States*, 697 F.2d 285 (10th Cir. 1983) (per curiam) (labor protective conditions can only be imposed on vendor/abandoning carrier and not upon acquiring non-carrier under § 10901); *Simmons v. ICC*, 697 F.2d 326 (D.C. Cir. 1982) (Congress, in recognizing need to abandon competing regulatory policies in abandonment cases, left traditional ICC labor policies largely untouched in 4-R and Staggers Act); *In re Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 658 F.2d 1149 (7th Cir. 1981) (labor protective conditions may only be imposed on vendor/abandoning carrier and not on acquiring non-carrier under § 10901), *cert. denied*, 455 U.S. 1000 (1982).

Congress also gave the ICC power to exempt transactions from the ICA if regulation would not further the transportation policy embodied in § 10101a and there was no threat to shippers of an abuse of market power. 49 U.S.C. § 10505(a). If the ICC finds that application of

the ICA becomes necessary, it can revoke the exemption. 49 U.S.C. § 10505(d). The ICC may not "relieve a carrier of its obligation to protect the interests of employees as required by this [Act]" in granting an exemption. 49 U.S.C. § 10505(g)(2).

The unions have failed in their attempts to persuade Congress to amend the ICA to include mandatory labor protections. *See* H.R. Conf. Rep. No. 1012, 99th Cong., 2d Sess. 250, *reprinted in* 1986 U.S. Code Cong. & Admin. News 3868, 3895; *Railroad Transportation Policy Act of 1979: Hearings Before the Committee on Commerce, Science, and Transportation on S. 1946*, 96th Cong., 1st Sess. 536, 539 (1979) (hereinafter *Hearings*) (statement of J. R. Snyder, Chairman, Legislative Committee, RLEA and National Legislative Director, UTU) (requesting that mandatory labor protections of § 10903(b)(2) be applied to abandonment and entry provisions in S. 1946);[2] *see also RLEA v. ICC*, 784 F.2d 959, 965 (9th Cir. 1986) (discussing Congress's failure to amend ICA).

Where Congress deemed labor protection necessary, it expressly provided for it. *See, e.g.*, 11 U.S.C. §§ 1170, 1172(b); 42 U.S.C. §§ 10903(b)(2), 11347. Given Congress's failure to amend the ICA, it is reasonable to infer that Congress did not intend to impose mandatory labor protective conditions in other sections. *RLEA v. United States*, 791 F.2d 994, 1002 (2d Cir. 1986); *Simmons v. ICC*, 760 F.2d 126, 130 (7th Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986).

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[2] During the hearings, Mr. Snyder commented:

> Much of the savings to be achieved as [a] result . . . will be made at the expense of the employees of the industry in terms of job abolishments and transfers. The railroad employee

Until today, the judiciary has not tolerated collateral attacks on ICC-approved abandonments.[3] *See United Transp. Union v. Norfolk and Western Ry. Co.*, 822 F.2d 1114 (D.C. Cir. 1987) (union RLA-based attack on arbitral award was in reality challenge to ICC order), *cert. denied*, 108 S.Ct. 700 (1988); *RLEA v. Staten Island R.R. Corp.*, 792 F.2d 7 (2d Cir. 1986) (ICC decision ordering sale of lines under § 10905's "forced sale" provisions could not be collaterally attacked by union's invocation of RLA procedures), *cert. denied*, 107 S.Ct. 927 1987); *Brotherhood of Locomotive Engineers v. Boston & Maine Corp.*, 788 F.2d 794 (1st Cir.) (RLA

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should be at least a partial beneficiary along with his employer of the fruits of this legislation. He must not be made its victim.

Hearings, supra at 539.

H.R. 3332, 100th Cong., 1st Sess. (1987), currently pending before the House of Representatives Committee on Energy and Commerce, would amend the ICA to explicitly provide that the ICA does not preempt union rights under the RLA.

[3] In *RLEA v. Pittsburgh & Lake Erie R.R.*, 831 F.2d 1231 (3d Cir. 1987), we held that the district court was without jurisdiction to enjoin a labor strike under the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115. Although our opinion in that case intimated that RLA dispute mechanisms should not be subordinated to the ICA, it has been cited in support of the dismissal of a union RLA-based attempt to collaterally attack an ICC exemption under § 10505. *Decker v. CSX Transp., Inc.*, 672 F.Supp. 674, 678-79 (W.D.N.Y. 1987). Our opinion was distinguished in *United Transp. Union v. Burlington Northern R.R.*, 672 F.Supp. 1579 (D. Mont. 1987) from an injunction of an ICC-approved sale, which would constitute a direct attack on an ICC order, as opposed to enjoining a union strike against an employer: "A strike by union members against their employer does not directly contradict or encroach upon the authority of the ICC. The authorization of the sale still stands, and at the same time the employees have the right to pressure the employer to negotiate labor protections." 672 F. Supp. at 1583 n.3. I believe that this distinction is correct and that our earlier opinion in this case should be so construed.

status quo injunction would be collateral attack on ICC's approval of § 10505 exemption from ICA of lease of lines to another railroad), *cert. denied,* 107 S.Ct. 111 (1986); *Chicago & North Western Transp. Co. v. RLEA,* No. 88-444 (N.D. Ill. March 16, 1988) (applying *Staten Island* in refusing to enjoin ICC-approved sale and enjoining union strike based on finding that dispute was "minor" within RLA); *RLEA v. City of Galveston,* No. 87-359 (S.D.Tex. Nov. 4, 1987) (RLEA request for injunction based on § 6 of RLA dismissed under Fed. R.Civ.P. 12(b)(6) because of ICC order); *United Transp. Union v. Burlington Northern R.R.,* 672 F.Supp. 1579 (D.Mont. 1987) (any RLA injunction would directly interfere with ICC's grant of exemption to sale under § 10505); *Decker v. CSX Transp., Inc.,* 672 F. Supp. 674 (W.D.N.Y. 1987) (complaint dismissed under Fed.R.Civ.P. 12(b)(6) because district court was unable to grant requested RLA relief without interfering with ICC order exempting railroad sale from § 10901 requirements). *See also B.F. Goodrich Co. v. Northwest Indus., Inc.,* 424 F.2d 1349, 1352-54 (3d Cir.) (ICC decision sanctioning divestiture plan could not be collaterally attacked in district court, "so long as the practical effect of a successful suit would contradict or countermand a Commission order"), *cert. denied,* 400 U.S. 822 (1970). Courts of appeals have exclusive jurisdiction over review of ICC orders. 28 U.S.C. §§ 2321, 2342. RLEA has an avenue for review of an ICC order in such a court. *See, e.g., RLEA v. United States,* 811 F.2d 1327 (9th Cir. 1987) (review of ICC's denial of labor protective conditions on § 10901 sale). By "artfully wording" its pleadings, RLEA here is circumventing the avenue Congress has prescribed to appeal ICC denials of labor protective conditions. *See Kalo Brick & Tile Co.,* 450 U.S. at 324 (1981) ("It is difficult to escape the conclusion that the instant litigation represents little more than an attempt by a

disappointed shipper to gain from [a state court] the relief it was denied by the Commission.").

The underlying reason for this RLA challenge is the ICC's repeated refusal to impose labor protective conditions in § 10901 transactions, as evidenced by its rulemaking in *Ex Parte 392*. It strikes me as strange that the ICC has effectively denied labor protection in *all* § 10901 transactions, and that no union has ever been able to make the exceptional showing required by *Ex Parte 392*. *See RLEA v. Pittsburgh & Lake Erie R.R.*, 831 F.2d 1231, 1235 (3d Cir. 1987). One would think that in at least an occasional case, labor could and should be given protection to insure a "fair and equitable arrangement". That protection could be given without imposing a total *status quo* obligation on the railroads and obviating the purpose and goals of the 4-R and Staggers Act. Appropriate regulatory consideration of labor's interests would avoid the "Catch-22" of potential job destruction that full maintenance of the *status quo* entails. The perception by rail workers of ICC failure to consider labor's legitimate interests removes the middle ground and leaves us isolated at unbridgeable extremes.

Employees may well have certain vested rights which should attach to the proceeds of a sale. As labor perceives the ICC's position, they seem entitled to nothing. However, requiring exhaustion of RLA procedures leaves both employees and employers nothing, because the RLA *status quo* requirement practically guarantees the death of a near-bankrupt rail company. *See Staten Island*, 792 F.2d at 12 (since purpose of RLA is to ensure continued furnishing of railroad services to public, RLA does not authorize *status quo* if railroad can no longer provide rail service).

The RLEA's appropriate remedy in this case was appeal of the ICC's denial of labor protective conditions.[4] *See RLEA v. United States,* 811 F.2d 1327 (9th Cir. 1987) (remanded to ICC to permit RLEA to petition for revocation under § 10505(d) of denial of labor protective conditions). I note that RLEA's petition for revocation, filed October 2, 1987, is still pending and that on October 13, 1987 the ICC ordered P&LE to maintain its corporate existence until that petition was acted upon. If the ICC denies the petition, RLEA is free to voice its complaints regarding *Ex Parte 392* to the appropriate court of appeals. In addition, the union is entitled to resort to economic self-help to gain whatever bargaining advantages it can from P&LE. *See Pittsburgh & Lake Erie R.R.,* 831 F.2d at 1237. That test of wills, which imposes penalties on both parties, seems to me more likely to concentrate their attention in the face of the demise of both jobs and rail lines than the narcotic influence of maintaining benefits hard-won in the industry's earlier, healthier days.

For these reasons, I would vacate the district court's order granting summary judgment to the union and ordering P&LE to bargain under the RLA, and remand with instructions to dismiss.

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[4] RLEA's argument that placing exclusive jurisdiction over labor protective conditions in the ICC amounts to an implied repealer of RLA does not adequately consider the pre-1983 history of the industry and the uniform practice of both labor and management in referring the question of labor protective conditions to the ICC in acquisitions, abandonments and consolidations of service prior to passage of the 4-R and Staggers Acts. I believe the parties' long-standing practice under the statutes in question is relevant to legislative intent. What has changed is not the statute or the ICC's authority, but its policy as evidenced by *Ex Parte 392* and the attempts to get around it by using RLA § 6 procedures to attack ICC § 10505 exemptions.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-3664

RAILWAY LABOR EXECUTIVES' ASSOCIATION, APPELLANT

v.

PITTSBURGH & LAKE ERIE RAILROAD COMPANY

On Appeal from the Order of the
United States District Court for the
Western District of Pennsylvania
(D.C. Civ. No. 87-1745)

Argued October 21, 1987

Before: SLOVITER, BECKER, and MANSMANN,
Circuit Judges

(Filed October 26, 1987)

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Interstate Commerce Commission

**OPINION OF THE COURT
SUR MOTION FOR
SUMMARY REVERSAL**

SLOVITER, *Circuit Judge.*

The district court entered an order on October 8, 1987 enjoining the Railway Labor Executives' Association (RLEA), an association of the executive officers of nineteen railroad unions, from proceeding with its strike against defendant Pittsburgh & Lake Erie Railroad Company (railroad or P&LE).[1] RLEA appeals from that order contending, *inter alia*, that the district court had no jurisdiction to issue the injunction because section 4 of the Norris-LaGuardia Act, 29, U.S.C. § 104, has withdrawn jurisdiction from the federal courts to enjoin the strike activity involved in this case. Before us is the motion of RLEA to summarily reverse the district

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[1] The district court's order, although denominated a temporary restraining order, was in substance a preliminary injunction since it was issued after notice and a hearing, was not limited in time, and provided that it shall remain in effect until the court rules on the preliminary injunction for which no hearing has yet been scheduled. Accordingly, we have jurisdiction over this appeal pursuant to 28 U.S.C. § 1292(a)(1). *See* Professional Plan Examiners v. Lefante, 750 F.2d 282, 287 (3d Cir. 1984); San Franscisco Real Estate Investors v. Real Estate Investment Trust, 692 F.2d 814, 816 (1st Cir. 1982).

court or in the alternative to stay the injunction pending appeal, on which we have held expedited oral argument.

I.

The following facts are not disputed for purposes of this appeal: P&LE has collective bargaining agreements with various labor organizations whose chief executive officers are members of RLEA. Some of these agreements contain provisions protecting the job security of certain covered employees for their working lives. On July 8, 1987, P&LE entered into an agreement to sell to P&LE Railco, Inc. (Railco), a newly-formed subsidiary of Chicago West Pullman Transportation Corporation, all of P&LE's rail lines and certain operating properties. The jobs of P&LE's approximately 750 employees would be affected by the sale because Railco intends to drop approximately 500 employees and does not intend to comply with or assume any of the existing labor agreements between P&LE and its unions.

The unions were notified by P&LE on July 30, 1987 of the pending agreement, and promptly wrote to P&LE noting P&LE's failure to send notice under section 6 of the Railway Labor Act, 45 U.S.C. § 156, and requesting the railroad to bargain over, among other things, the effects of the transaction on its employees.[2] P&LE responded that the transaction is controlled by the Interstate Commerce Commission (ICC) and that section 6 bargaining would usurp the ICC's authority.

On August 19, 1987, RLEA filed a complaint in the United States District Court for the Western District of

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[2] Under the Railway Labor Act, there can be no unilateral action which would change the terms and conditions of employment while the procedures of the Act are being followed. *See* 18H T. Kheel, Business Organizations: Labor Law § 50.05[1] at 50-24 (1986).

Pennsylvania against P&LE to enforce the employees rights under the Railway Labor Act. RLEA sought a declaration that the provisions of the Railway Labor Act were applicable to this transaction, a declaration that the sale could not be consummated until all Railway Labor Act dispute resolution procedures have been exhausted, and an injunction prohibiting P&LE from completing the transaction until that time.

On September 15, 1987 the RLEA commenced a strike against P&LE. P&LE filed an answer to the complaint and a counterclaim seeking to enjoin the strike. The strike was temporarily halted by stipulation for a short period of time but continued thereafter. On September 21, 1987 the district court denied the railroad's request for a temporary restraining order against the strike, holding that such an injunction was precluded by section 8 of the Norris-LaGuardia Act, 29 U.S.C. § 108, because the railroad had not complied with its obligation under section 6 of the Railway Labor Act, 45 U.S.C. § 156, to give notice, bargain, and maintain the status quo.

On September 19, 1987 the purchasing company, Railco, filed a notice of exemption with the ICC pursuant to 49 C.F.R. § 1150.31. RLEA filed a petition for a stay, a petition for rejection of the notice of exemption, and a complaint seeking an order preventing consummation of the sale. The ICC denied the request for a stay on September 25, 1987. RLEA filed a petition for revocation, which is pending.

Following the ICC's action, PL&E filed a renewed motion for a temporary restraining order, and, after a hearing on October 8, 1987, the district court entered the injunction order which is the subject of this appeal.

In essence, the district court found that the strike substantially curtails the operations of P&LE, that it

would cause P&LE's customers and employees to suffer irreparable harm, and that an injunction against the strike was warranted because, by approving the sale of P&LE's assets to Railco, "[t]he ICC, and the statutes and regulations under which it operates, has eliminated the effects of the sale upon P&LE employees as a legitimate consideration in the granting of injunctive relief." Transcript of October 8, 1987 at 77.

The RLEA appeals. Because we conclude that section 4 of the Norris-LaGuardia Act divests the district court of jurisdiction to enter the injunction of October 8, 1987, we will summarily reverse,[3] without considering RLEA's additional argument relying on section 8 of the Norris-LaGuardia Act.

II.

Under the mandate of the Norris-LaGuardia Act, 29 U.S.C. §§ 101-15, as revealed by the words of the statute, the unmistakably clear legislative history,[4] and a long line of Supreme Court cases, district courts lack the power to enjoin employees from exercising their right to strike. *See, e.g., Jacksonville Bulk Terminal, Inc. v. International Longshoremen's Association,* 457 U.S. 702, 708 (1982); *Milk Wagon Drivers' Union Local No. 753 v. Lake Valley Farm Products, Inc.,* 311 U.S. 91, 101-03 (1940).

Section 4 of the Act is explicit:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or

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[3] *See* Internal Operating Procedures of the Third Circuit, Chapter 17.

[4] *See* H.R. Rep. No. 669, 72d Cong., 1st Sess. 7-8 (1932).

> growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from . . .
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment.

29 U.S.C. § 104 (1982).

Notwithstanding this unambiguous language, the Supreme Court has, in certain limited circumstances, determined that there should be an "accommodation" of Section 4's seemingly blanket prohibition on the exercise of the district court's injunctive powers. For example in *Boys Markets, Inc. v. Retail Clerk's Union Local 770*, 398 U.S. 235 (1970), the Supreme Court held that a federal court is not precluded from enjoining a strike in breach of a collective bargaining agreement that contains a no-strike clause and a mandatory grievance adjustment or arbitration procedure. In light of the strong federal labor policy in favor of labor arbitration, the Court concluded that "the core purpose of the Norris-LaGuardia Act is not sacrificed by the limited use of equitable remedies to further this important policy." *Id.* at 253.

P&LE argues, and the district court found, that the Norris-LaGuardia Act must be accommodated to the Interstate Commerce Act. However, the Norris-LaGuardia Act will be accommodated to another federal statute only if that statute irreconcilably conflicts with the command of the Norris-LaGuardia Act and such an accommodation is necessary to enforce some other overriding and equally clear federal labor policy.

A review of the development of the accommodation cases shows that they have focused on "the need to accommodate two statutes when both were adopted as a

part of a pattern of labor legislation." *Brotherhood of R.R. Trainmen v. Chicago River and Indiana R.R. Co.*, 353 U.S. 30, 42 (1957). *See e.g., id.* at 39-42 (plain language of Railway Labor Act requiring that "minor" disputes be submitted to arbitration and legislative history demonstrating Congressional intent that Railway Labor Act grievance procedure be construed as a compulsory substitute for employee's economic self-help, require accommodation of Norris-LaGuardia Act's anti-injunction provision); *Brotherhood of Locomotive Engineers v. Louisville and Nashville R.R. Co.*, 373 U.S. 33, 41-42 (1963) (procedure in Railway Labor Act for judicial review of monetary awards by National Railroad Adjustment Board is integral part of Railway Labor Act grievance procedure which would be violated by a strike); *Chicago & North Western Ry. Co. v. United Transp. Union*, 402 U.S. 570, 581-84 & n.18 (1971) (union could be enjoined from striking if it failed to perform its obligations under the Railway Labor act to "exert every reasonable effort to make and maintain agreements"; the "earlier general provisions" of the Norris-LaGuardia Act must accommodate the "subsequent, more specific provisions" of the Railway Labor Act when they are in "irreconcilable conflict"). *Cf. Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768, 774-75 (1952) (union could be enjoined from racially discriminatory practices which are in violation of Railway Labor Act).

P&LE argument, joined by the ICC as amicus curiae,[5] that the Interstate Commerce Act is comparable to the Railway Labor Act and that, therefore, the prohibitions of the Norris-LaGuardia Act, must be accommodated to

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[5] The ICC filed a motion to intervene in this appeal. We granted it leave to file a brief as amicus curiae and to present oral argument.

the ICC's actions, is unpersuasive. The Interstate Commerce Act, as amended, lists fifteen policies relevant to the regulation of the railroad industry. 49 U.S.C. § 10101a. These include allowing competition and the demand for services to establish reasonable rail transportation rates, minimizing the need for federal regulatory control, and promoting a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the ICC. 49 U.S.C. § 10101a(1), (2), (3). Among the other policies listed are encouragement and promotion of energy conservation, 49 U.S.C. § 10101a(15), and encouragement of "fair wages and safe and suitable working conditions in the railroad industry." 49 U.S.C. § 10101a(12). Nothing in the statutory language suggests that this incidental reference to "fair wages" converts the regulatory scheme over rail transport into a labor law.

Pursuant to the Act, the ICC has been given authority to approve various transactions, including acquisitions, involving rail carriers. When there is a consolidation, merger or acquisition involving existing rail carriers, the ICC must impose certain employee protective provisions. 49 U.S.C. § 11347. However, it is P&LE's position, and the RLEA concedes for purposes of this appeal, that the P&LE sale is not governed by section 11347, but that the transaction falls within the ambit of 49 U.S.C. § 10901 covering the acquisition of a rail carrier's operation by a non-carrier. Section 10901 gives the ICC discretion to require the imposition of employee protective provisions, but does not make imposition of these provisions mandatory.[6] Compare 49 U.S.C.

[6] Section 10901(e) provides that "[t]he Commission may require any rail carrier proposing both to construct and operate a new railroad line to provide a fair and equitable arrangement for the protection of the interests of railroad employees who may be

§ 10901(e) ("Commission may require" labor protective provisions) (emphasis added) *with* 49 U.S.C. § 11347 ("Commission *shall* require" such provisions) (emphasis added). In fact, on December 19, 1985, the ICC adopted final rules exempting from regulation almost all acquisitions and operations under 49 U.S.C. § 10901, *Ex parte No. 392 (Sub-No. 1)*, 1 I.C.C.2d 810 (1985), *review denied sub nom., Illinois Commerce Commission v. ICC,* 817 F.2d 145 (D.C. Cir. 1987), thereby placing upon a protester the burden of filing a petition to revoke the exemption. The ICC stated that such revocation would be granted only in an "extraordinary case" by "an exceptional showing of circumstances" justifying the imposition of labor protection. *Ex Parte No. 392*, 1 I.C.C.2d at 815. No such revocation has been granted since the decision in *Ex Parte No. 392. See Central Michigan Ry. – Acquisition and Operation.* ICC Finance Docket No. 31059, served September 4, 1987 (unpublished) (Dissenting opinion of Vice-Chairman Lamboley).

Neither 49 U.S.C. § 10901 nor 49 U.S.C. § 11341, the other provision relied on by P&LE which makes the ICC's authority "exclusive" with respect to combinations of carriers, contains any language which would suggest Congress intended to override the anti-injunction policy of section 4 of the Norris-LaGuardia Act by the Interstate Commerce Act. The ICC's authority to consider the incidental effect of the transaction on

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affected" by a decision to operate a new railroad line (emphasis added). The ICC has suggested that its authority to impose labor protection is not limited by the plain language of this section, but instead extends to any transaction covered by section 10901. *See* Ex Parte No. 392 (Sub-No. 1), 1 I.C.C. 2d 810, 815 (1985), *review denied sub nom.*, Illinois Commerce Comm'n v. I.C.C. 817 F.2d 145 (D.C. Cir. 1987).

labor and its discretionary authority to require provisions that protect employees do not make the Interstate Commerce Act comparable to the Railway Labor Act, which contains a comprehensive scheme of alternative dispute resolution mechanisms. Neither the ICC nor P&LE have pointed to any language in the legislative history of any of the labor laws or the Interstate Commerce Act which suggests that the strong national policy embodied in the Norris-LaGuardia Act is to be subordinated to the ICC's authority to approve an acquisition of railroad property.

Arguments comparable to those made by P&LE were rejected by the Supreme Court in *Order of R.R. Telegraphers v. Chicago & Northwest Ry Co.*, 362 U.S. 330 (1960). In that case, the Supreme Court held that the absolute prohibition of the Norris-LaGuardia Act against enjoining strikes growing out of any labor dispute deprived the district court of the jurisdiction to enjoin a strike that arose out of a railroad's decision to close several stations. Although the closings had been approved pursuant to the Interstate Commerce Act by the relevant state public utility commissions, and the railroad argued that the strike ran "counter to the congressional policy expressed in the Interstate Commerce Act to foster an efficient national railroad system," *id.* at 342, the Court held controlling "other legislation . . . like the Railway Labor and Norris-LaGuardia Acts [where] Congress has acted on the assumption that collective bargaining by employees will also foster an efficient national railroad service." *Id.* The majority of the Court rejected the argument of Justice Whittaker, writing for four dissenters, that because Congress had given the ICC and the public utility commissions exclusive jurisdiction over the regulation of station closings, the issue was removed from the field of collective

bargaining. The Court also rejected the argument (similar to that made by P&LE before us) that a failure to enjoin the strike could lead to "the financial debilitation" of the railroad. *Id.* at 342. The Court made clear that such arguments must be addressed to Congress, and not to the courts which are obligated to following the provisions of the Norris-LaGuardia Act. Significantly, at the time of the *Telegraphers* decision, section 5(2)(f) of the Act, the predecessor of 49 U.S.C. § 11347, provided that the Commission "*require* a fair and equitable arrangement to protect the interests of the railroad employees affected." Act of Sept. 18, 1940, ch. 722, Title I § 7, 54 Stat. 906-07 (repealed 1978); current version at 49 U.S.C. § 11347. (emphasis added).

The Telegraphers case was relied on by the Fifth Circuit in its decision holding that a district court had no jurisdiction to enjoin a strike protesting changes in working conditions that resulted from consolidation of certain operations of several railroads, even though the ICC had approved the transaction. *See Texas and New Orleans R.R. Co. v. Brotherhood of R.R. Trainmen*, 307 F.2d 151 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963). Judge Rives, writing for the court, explained, in reasoning we find applicable and persuasive, that the Interstate Commerce Act is not one of those rare statutes to which the Norris-LaGuardia Act must be accommodated. Such an accommodation need only be made "where Congress, through such detailed legislation as the Railway Labor Act and Taft Hartley Act, 29 U.S.C. § 141 *et seq.*, has channelled these economic forces [capital and labor] . . . into special processes intended to compromise them' [*Brotherhood of R.R. Trainmen v. Chicago River & Indiana P.y. Co.*] (353 U.S. at 41, 77 S. Ct. at 640) and where these processes would be frustrated without injunctive aid." 307 F.2d at

157 (ellipsis and first brackets in original). The court continued:

> The types of special processes which the courts have enforced with injunctive relief have all involved extensive negotiations and bargaining between the parties, or agreements which result from such bargaining; never processes which allow management to unilaterally choose a change in working conditions and give the union a small voice of protest if the change is unfair or inequitable.

Id. at 158. This language is directly applicable here, since, in the absence of any provision requiring "extensive negotiations and bargaining," RLEA and the employees it represents would be relegated to "a small voice of protest" without the possibility of either negotiation or economic self-help.[7]

Just last Term the Supreme Court reiterated the Norris-LaGuardia Act policy barring judicial intervention in labor disputes. In *Burlington Northern R.R. Co. v. Brotherhood of Maintenance of Way Employees,* 107 S.Ct. 1841 (1987), the Court unanimously held that the district court has no jurisdiction to enjoin a strike against a railroad which took place after the parties exhausted the settlement procedure mandated by the Railway Labor Act. The Court declined to narrow the definition of "labor dispute" in the Norris-LaGuardia Act, and reaffirmed that "the legislative history leaves no doubt that Congress intended the Norris-LaGuardia Act to cover the railroads." *Id.* at 1848. It viewed Congress' policy expressed in the Norris-LaGuardia Act as inconsistent with a narrow construction of the statute

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[7] It is noteworthy that in *Texas and New Orleans R.R.*, the court held the strike could be maintained even though the ICC had issued certain labor protective provisions, 307 F.2d at 154.

and left it to Congress to restore federal court power to enjoin strikes and picketing if it so chooses. *Id.* at 1849-50. 1855.[8]

We are, of course, cognizant that a strike will cause economic hardship to the railroad, its shippers, and the community. Such harm is a consequence of the congressional policy leaving resolution of disputes to economic self-help by the parties. We intimate no view as to whether the provisions of the Railway Labor Act are applicable to this dispute so that the district court would be entitled to enjoin the strike while that Act's dispute resolution mechanisms are underway. RLEA's complaint seeking a declaration that the Railway Labor Act is applicable to this dispute is the merits issue before the

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[8] The district court relied on Missouri Pacific R.R. Co. v. United Transp. Union, 782 F.2d 107 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 3209 (1987), where the court held that because of ICC approval of a rail consolidation it could enjoin a strike over the employer's refusal to bargain over the effects of that transaction. That decision is distinguishable.

First, the statutory exemption relied on by the Eighth Circuit (a "carrier, corporation, or person participating in [an] approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction." 49 U.S.C. § 11341(a)) applies only to transactions "approved by or exempted by the Commission *under this subchapter*." (emphasis added). "[T]his subchapter" refers to Subchapter III of Chapter 113 of the Interstate Commerce Act, §§ 11341-51, under which the transaction in *Missouri Pacific* was approved, and not to 49 U.S.C. § 10901, Subchapter 1 of Chapter 109 of the Act, applicable here.

Second, the Eighth Circuit itself noted that "[a]ffected employees are not left out in the cold, because § 11347 *requires* the ICC to impose employee protective conditions." *Missouri Pacific*, 782 F.2d at 112 (affirming and quoting the district court's opinion. 580 F. Supp. 1490, 1505-06) (emphasis added). However, as noted in the text, there is no such requirement under 49 U.S.C. § 10901(e).

district court. The only issue before us is the jurisdiction of the district court to issue the order of October 8, 1987.

Because we have concluded that the district court was without jurisdiction to enter an injunction, we will reverse that order and remand this case for further proceedings.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX E

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 31121

P&LE RAILCO INC.–EXEMPTION ACQUISITION AND OPERATION–LINES OF THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY AND THE YOUNGSTOWN AND SOUTHERN RAILWAY COMPANY

Finance Docket No. 31122

CHICAGO WEST PULLMAN CORPORATION–CONTINUANCE IN CONTROL EXEMPTION–P&LE RAILCO, INC. AND–CONTROL EXEMPTION–THE PITTSBURGH, CHARTIERS AND YOUGHIOGHENY RAILWAY COMPANY

Decided: October 13, 1987

On October 2, 1987, the Railway Labor Executives' Association (RLEA) filed a petition for reconsideration of a decision served September 29, 1987, denying the requests for stay of the effectiveness of [illegible] exemptions in this proceeding. RLEA asks that a stay be imposed at this time.

The petition will be rejected. Under the Commission's class exemption procedures for the acquisition and operation of rail lines under 49 U.S.C. 10901, a petition for reconsideration of a stay denial does not lie. Title 49 CFR 1150.32(b) provides that an exemption under Subpart D will be effective 7 days after the notice is filed. Moreover, we have already issued a decision declining to stay this transaction. The appropriate remedy at this

stage of the proceeding is a petition for revocation of the exemptions.[1]

RLEA's petition has raised certain matters which do require clarification. The Commission stated in the body of the September 29th decision that ". . . we will require P&LE as a condition to effecting this transaction, to maintain its corporate existence until the Commission has had an opportunity to consider a petition for revocation filed within 30 days." As RLEA points out, the Commission failed to include this requirement in the ordering paragraph. That oversight will be rectified in this decision. Also, RLEA questions the scope of the historic preservation condition which the Commission imposed upon applicants pending completion of the review process mandated by section 106 of the National Historic Preservation Act. RLEA interprets the condition as preventing only the destruction of the historic structures and not deterioration through reduced maintenance. The Commission's order prohibits applicant from taking *any* action to jeopardize the historic integrity of the sites and structures on the line that are 50 years old or older. (Emphasis added.) This language obviously encompasses any decrease in maintenance envisioned by RLEA.

This decision will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. The petition for reconsideration is rejected.

2. The Pittsburgh and Lake Erie Railroad is required, as a condition to effecting this transaction, to maintain

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[1] RLEA also filed a petition for revocation of the exemptions. A decision addressing the petitions for revocation will be issued separately.

its corporate existence until the Commission has had an opportunity to consider petitions for revocation filed on or before October 29, 1987.

3. This decision is effective on the date of service.

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioners Sterrett, Andre, and Simmons. Commissioner Simmons dissented in part with a separate expression. Vice Chairman Lamboley dissent with a separate expression.

Noreta R. McGee
Secretary

(SEAL)

COMMISSIONER SIMMONS, dissenting in part:

I continue to believe that a stay of limited duration was warranted in this proceeding. See my separate expression to the decision of September 29.

VICE CHAIRMAN LAMBOLEY, dissenting:

I would grant the petition for reconsideration and impose a stay as discussed in my dissenting separate expression to the decision served September 29, 1987.

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 31121

P&LE RAILCO INC.–EXEMPTION ACQUISITION AND OPERATION–LINES OF THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY AND THE YOUNGSTOWN AND SOUTHERN RAILWAY COMPANY

Finance Docket No. 31122

CHICAGO WEST PULLMAN CORPORATION–CONTINUANCE IN CONTROL EXEMPTION–P&LE RAILCO, INC. AND–CONTROL EXEMPTION–THE PITTSBURGH, CHARTIERS AND YOUGHIOGHENY RAILWAY COMPANY

Finance Docket No. 31126

RAILWAY LABOR EXECUTIVES' ASSOCIATION

v.

PITTSBURGH & LAKE ERIE RAILROAD CO., ET AL.

Decided: September 25, 1987

On September 19, 1987, P&LE Railco, Inc. (Railco), a noncarrier, filed a notice of exemption under 49 CFR 1150.31 to acquire and operate certain properties of The Pittsburgh and Lake Erie Railroad Company (P&LE) and its wholly-owned subsidiary, The Youngstown and Southern Railway Company (Y&S) (Finance Docket No. 31121). The properties consist of the main line and all branch lines of P&LE and Y&S, which comprise a single system of approximately 182 miles extending generally from Youngstown, OH, to Brownsville and Connells-

ville, PA. Also under the agreement, Railco will acquire 230 miles of incidental trackage rights over Conrail lines. Under 49 CFR 1150.32(b), the exemption notice is scheduled to become effective 7 days after it is filed (September 26, 1987).

Railco, which was formed for the purpose of acquiring and operating the lines of P&LE and Y&S, is a wholly-owned subsidiary of noncarrier Chicago West Pullman Transportation Corporation (CWPT), which in turn, is a wholly-owned subsidiary of noncarrier Chicago West Pullman Corporation (CWP). PC&Y Holdings (Holdings) is another noncarrier subsidiary of CWPT. Holdings was formed to acquire the shares of The Pittsburgh, Chartiers and Youghiogheny Railway (PC&Y) that are being purchased from P&LE by Railco.[1]

Concurrently with the filing of Railco's notice, CWP filed a notice of exemption under 49 CFR 1180.2(d)(2) to continue control, through CWPT, of Railco and to control, through CWPT and Holdings, a 50 percent ownership interest in PC&Y (Finance Docket No. 31122).

On September 24, 1987 Howard M. Metzenbaum, United States Senator from Ohio and Richard R. Celeste, Governor of Ohio, filed letter-petitions requesting a stay of the effectiveness of the exemption of this transaction. Also on September 24, 1987, the Commission received a letter from Harry Meshel, Minority Leader of the Ohio Senate, asking the Commission to delay the sale of the P&LE to Chicago West Pullman Corporation. By mailgram received September 24, 1987, U.S. Representative from Pennsylvania William J. Coyne asked the Commission to delay its action on

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[1] Upon consummation of the purchase by Railco of the assets of P&LE and Y&S, Railco will direct P&LE to deliver to Holdings 50 percent of the stock of PC&Y.

the Chicago West Pullman notice of exemption. Ohio State Representative Robert F. Hagan seeks similar relief. Senator Meshel, Representative Coyne, and Representative Hagan wish their correspondence to be treated as stay petitions. We will therefore treat the letters and mailgram as requests for stays.

The Railway Labor Executives' Association (RLEA) filed a complaint,[2] a petition for rejection, and a petition for stay. The complaint (Finance Docket No. 31126) alleges that the provisions of 49 U.S.C. 11343, *et seq.* rather than 10901, are applicable to the transaction and requests a cease and desist order be issued to prevent consummation. Subsequently, RLEA also filed an emergency petition in Finance Docket No. 31126 for "temporary cease and desist order" in which it addresses issues substantially similar to those raised in its complaint.

The request to reject is based on RLEA's belief that the notice of exemption in Finance Docket No. 31121 is incomplete without an environmental report (*see* 49 CFR 1105.7). Petitioners also allege that the existence of historical structures on the line requires that various reviews be completed pursuant to the National Historic Preservation Act prior to effectiveness of the exemption. On this basis, it seeks a stay of the exemption.

Railco replied to the requests of Senator Metzenbaum and Congressman Coyne.

The requests for stay will be denied. Petitioners have not demonstrated justification for a stay in accordance with the four criteria set forth in *Washington Metro-*

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[2] The RLEA complaint is addressed here only to the extent it requests entry of a cease and desist order.

politan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977) viz.,

> (1) that there is a strong likelihood that the movant will prevail on the merits;
>
> (2) that the movant will suffer irreparable harm in the absence of a stay;
>
> (3) that other interested parties will not be substantially harmed; and
>
> (4) that the public interest supports the granting of the stay.

In *Washington Metropolitan Area Transit Comm.*, the District of Columbia Circuit held that, in a case in which the other three factors strongly favor interim relief, a stay may be granted if the movant has made a substantial case on the merits. Petitioners have not demonstrated justification for a stay under any of the above criteria. Most importantly, petitioners have not shown that they will likely prevail on the merits or that they will suffer irreparable harm absent a stay.

1. The petitioners have not demonstrated a likelihood that they will prevail on the merits. The size of a transaction, standing alone, is not dispositive of the applicability of the exemption. *See, e.g.*, Finance Docket No. 31071, *Red River Valley & Western Railroad Company–Acquisition and Operation Exemption–Certain Lines of Burlington Northern Railroad Company*, served July 22, 1987, involving a notice of exemption under 49 C.F.R. 1150.31 for 656 miles of rail line. Nothing in our rules or decision adopting them limits the use of the exemption to transfers of small line segments with little or no public impact. Moreover, while there will be an impact on P&LE and Y&S employees, we have found that the issue of labor protection may be resolved after an exemption becomes effective. The class exemption rules provide for employee

protection upon a showing of particular need. Such showing has not been made so as to justify a stay here.

The issue of review under section 11343 (as opposed to 10901) can also be addressed following effectiveness of the notice (*see* Finance Docket No. 30237, *Maryland Midland Railway, Inc.–Exemption from 49 U.S.C. 11343 and 11301* (not printed), served January 6, 1987 and August 10, 1987, where we reversed a prior decision finding section 10901 applicable). Furthermore, RLEA has not offered sufficient evidence to show it is likely to prevail on the merits of this issue so as to warrant a stay or cease and desist order. Many factors not addressed by RLEA affect whether a transaction such as this will be considered subject to sections 11343 or 10901. *See* Finance Docket No. 30911, *Chicago, Missouri & Western Railway Co.–Exemption Acquisition and Operation–Illinois Central Gulf Railroad Co.* (not printed), served May 12, 1987, in which we found that a sale to a newly formed carrier controlled by a company that controlled another rail carrier was subject to section 10901. *See also Railway Labor Executives' Association v. I.C.C. and U.S.*, 819 F.2d 1173 (D.C. Cir. 1987) in which a similar structuring and sale under section 10901 rather than 11343 was affirmed. If, in fact, P&LE's interest in the Monongahela Railway Co. is being transferred, the section 11343/10901 labor issues still can be addressed after the fact. Moreover, the fact that this ⅓ interest may be transferred is not required to be included either in the notice under Ex Parte No. 392 (Sub-No. 1), or the control exemption notice (F.D. No. 31122). Our rules do not specifically require this detailed information, and a ⅓ interest may not, in the circumstances, constitute control.

2. Petitioners have failed to show irreparable harm absent a stay. Under section 10505(d), a petition to

revoke can be filed at any time, even after consummation. Indeed in Ex Parte No. 392 (Sub-No. 1), *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 310 (1986) (*Class Exemption*). We expressly provided that:

> [A]ny transaction could be reversed in whole or in part, and we specifically reserve the right to require divestiture to avoid abuses of market power resulting from the transaction, or to regulate in accordance with the provisions of the rail transportation policy.

Petitioners have failed to show that employees could not be made whole in the unlikely event that the Commission imposes labor protection in a future exemption revocation proceeding. *See* discussion *supra*. Consequently, any alleged harm to the affected area based on an adverse impact on employees is speculative.[3] While revocation is normally an adequate remedy, here because this transaction involves the sale of P&LE's entire line, we will require P&LE as a condition to effecting this transaction, to maintain its corporate existence until the Commission has had an opportunity to consider a petition for revocation filed within 30 days. While it is alleged that the transfer may threaten essential services, petitions have failed to offer any other specific evidence of irreparable harm in this regard.

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[3] RLEA also alleges that stay is justified based on the pendency of AB-160 (Sub. No. 5X), *Montour Railroad Company–Abandonment Exemption–In Allegheny and Washington Counties, PA*. We disagree. An abandonment was granted there, and the only pending issue is whether labor protective conditions should be imposed. After the fact relief (if found justified) will fully protect railroad employees. This was not a matter relevant to this sale transaction that warranted notice in P&LE's filing.

Finally, the environmental and historic structures issues do not support a finding of irreparable harm. In the context of this transaction (*i.e.*, a change in ownership) the quality of the environment could be affected only by a decline in the labor force such that, for example, maintenance-of-way practices would be virtually eliminated. Such a circumstance is not contemplated here.[4] As to historic structures and the section 106 process, the Commission will consult with the appropriate officials in the affected states to ensure compliance and a condition will be imposed to ensure the historic integrity of sites and structures 50 years old or older. A stay is therefore not necessary.

3. Other affected parties would be substantially harmed by the grant of a stay. A stay would likely harm applicant and the shippers it intends to serve. It would delay the start of applicant's operations, and would disrupt the planned transition between P&LE's and Railco's service. P&LE operations are marginal at best. It has lost $60 million in the past few years. It is unclear whether or how long it can continue operations. It states that for some time it has been in default on $135 million in debt and, pursuant to a restructuring agreement, has been liquidating assets. Its creditors are increasingly unwilling to continue this procedure. If it is forced shortly to cease operations, the adverse economic impact on shippers, employees, and communities on the lines will be substantial. In addition, the proposed sale of the P&LE to Railco has triggered sub-

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[4] The petition to reject will be denied. Our rules are not entirely clear. Applicants could have read 49 CFR 1105.6(c)(2) as applicable. In any event, 49 CFR 1105.7(f) allows waiver of rules on our own motion. We find the notice adequate and see no nexus between the changes contemplated here and adverse impact on the environment.

stantial labor unrest including a strike on the line. A grant of the requested stay would prolong the uncertainty surrounding the fate of the P&LE and also prolong the controversy and attendant disruption in rail service surrounding the sale.

4. The public interest does not support a grant of a stay. Rather, it is in the public interest to allow the class exemption to take effect, and to address the issues raised by petitioners via the revocation process.

This decision will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. The petitions for stay, entry of a cease and desist order, and rejection are denied.

2. Applicants are prohibited from taking any action to jeopardize the historic integrity of sites and structures on the line that are 50 years old or older. This condition will remain in effect pending completion of the section 106 review process.

3. This decision is effective on the date of service.

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioners Sterrett, Andre, and Simmons. Vice Chairman Lamboley dissented. His separate expression will be served separately. Commissioner Simmons dissenting with a separate expression.

Noreta R. McGee
Secretary

(SEAL)

COMMISSIONER SIMMONS, dissenting:

In fairness I would have granted a stay request of two weeks in order to permit the affected persons, namely employees, to continue negotiations with the seller and vendor. Apparently, Railco is willing to discuss compensation terms for displaced employees and benefits and wages with the unions. I do note here this unique opportunity where a purchaser is willing to provide some type of guarantees to affected employees.

VICE CHAIRMAN LAMBOLEY, dissenting:

I would grant a stay for a period of time not to exceed 15 days, in order to more fully consider issues raised concerning the propriety of exemption in the circumstances of this case, and at the same time to afford the parties an opportunity to continue efforts to negotiate resolution of certain critical issues.

Currently the rail operations are involved in a strike, the scope of which encompasses not only the seller and potentially the putative buyer, but also aspects of the transaction for which exemption is here requested.

Denial of stay as the majority has chosen to do, raises significant new issues concerning the scope of Commission jurisdiction and the accommodation of the ICA and RLA.[1]

As to jurisdiction, in the absence of stay, it is not clear that Commission will continue to have jurisdiction over the seller which upon closing, will cease to be a carrier. Then ordinary corporate and contract law questions may replace transportation subject matter issues. The remedial alternatives against the seller may now be more restricted. Indeed, revocation of exemption may no longer be an available remedy. In my view, whether the Commission can effectively condition a denial of stay and retain jurisdiction is debatable.

As to preemption or accommodation of the ICA and the RLA, it is likewise not clear at this juncture whether existing activity presumably legitimate and lawful under the RLA, for which injunctive relief has been judicially denied, may nevertheless be transformed into unlawful activity by virtue of a subsequent sale transaction under the ICA, arguably exempted from review

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[1] Interstate Commerce Act, 49 U.S.C. Sections 10101, et seq. Railway Labor Act, 45 U.S.C. Sections 151, et seq.

under the class exemption of Ex Parte No. 392 (Sub-No. 1). The majority decision is presently silent on this significant issue.

Finally, other issues aside, considering the equities of *all* parties, their respective benefits and burdens, and the Commission's discretionary policy regarding employee displacement issues, in my view, stay is appropriate for brief period to evaluate the seller's status after terminating its entire rail operations and its apparent insolvent financial condition.

APPENDIX F

INTERSTATE COMMERCE COMMISSION REPORTS

EX PARTE NO. 392 (Sub-No. 1)

CLASS EXEMPTION FOR THE ACQUISITION AND OPERATION OF RAIL LINES UNDER 49 U.S.C. 10901

Decided December 19, 1985

The Commission adopts final rules exempting from regulation all acquisitions and operations under 49 U.S.C. 10901, except where a class I railroad abandons a line and another class I railroad then acquires the line where the transaction results in a major market extension.

DECISION

BY THE COMMISSION:

On August 28, 1985, we published a Notice of Proposed Rules (NPR) (50 F.R. 34880) to exempt from regulation acquisitions and operations[1] under 49 U.S.C. 10901.[2] Noncarriers require Commission approval under section 10901 to acquire or operate a rail line in interstate commerce. Existing carriers require approval under section 10901 to acquire or operate a line owned by a noncarrier and to acquire and operate previously abandoned lines of an existing carrier.[3] *Ap-*

[1] The terms "acquire" and "operate" include interests in railroad lines of a lesser extent than fee simple ownership, such as a lease or a right to operate.

[2] This proposal does not include railroad construction, which is also governed by section 10901.

[3] Acquisition of an active rail line where both buyer and seller are carriers is governed by 49 U.S.C. 11343.

plication Proc.—Construct., Acq. or Oper. R. Lines, 365 I.C.C. 516, 518 (1982) (*Application Proc.*), and 49 CFR 1150.1. Section 10901 also gov[illegible] a change in operators. The regulations gover[illegible] section 10901 transactions are set forth at 49 CFR 1150.

The NPR expanded a proposal filed by Anacostia & Pacific Corp. (APC) seeking exemption for noncarrier acquisitions and operations, where the noncarrier would be a class III carrier after completion of the transaction. With one exception, the NPR proposed to exempt from regulation all acquisitions and operations under 49 U.S.C. 10901, including: (1) acquisition of trackage rights governed by 10901; (2) acquisition by a noncarrier of rail property that would be operated by a third party; (3) operation by a new carrier of rail property acquired by a third party; and (4) a change in operators on the line. The exemption would not apply when another class I railroad abandons a line and a class I railroad then acquires the line in a transaction that would result in a major market extension as defined at 49 CFR 1180.3(c).

The NPR proposed to amend the regulations at 49 CFR 1150 by adding Subpart D, *Exempt Transactions.* The proposed regulations required the filing of a notice of exemption that would be effective 7 days after it is filed. The Commission would published the notice in the Federal Register within 30 days of the filing. The NPR states that the exemption would be revoked if the notice contained false or misleading information.

We noted in the NPR that in recent years most requests for authority under section 10901 have been exemptions rather than applications, and that virtually all of the exemption requests have been granted. We concluded tentatively that a case-by-case handling of these exemptions involved a burdensome and unnecessary ex-

penditure of resources both by individual petitioners and by the Commission. We invited comments on both APC's exemption request and the expanded exemption proposal.

Twenty-two comments were filed,[4] the overwhelming majority in support, because those parties concluded that the exemption would expedite and reduce the costs of entry, help maintain service, and eliminate any uncertainty in negotiations with potential purchasers, especially those unfamiliar with the regulatory process. Some State agencies request that they be served with a copy of the notice, and argue that there be a longer comment period and that more financial and operational information should be filed. The opposing unions argue that this exemption is a drastic change in railroad regulation without adequate support in the record. They also argue that the Commission should impose employee protective conditions.

As discussed below, we will adopt the proposal. The new rules are set forth in the appendix.

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[4] Comments were filed by: Association of American Railroads; Southern Pacific Transportation Company and St. Louis Southwestern Railway Company; Tuscola & Saginaw Bay Railway Company, Inc.; Railtex Inc.; Indiana Hi-Rail Corporation; Rail Management and Consulting Corporation; Illinois Central Gulf Railroad Company; L. B. Foster Company; Jackson & Jessup; Iowa Northern Railway Company; Consolidated Rail Corporation; American Short Line Railroad Association; New York Department of Transportation; Michigan Department of Transportation; Pinsly Railroads; General Electric Credit Corporation; Railway Labor Executives' Association; Board of Trade of the City of Chicago; Illinois Department of Transportation; Alabama Public Service Commission; Illinois Commerce Commission; and United Transportation Union.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10505, the Commission must exempt transactions when regulation is unnecessary to implement the rail transportation policy and the matter is of limited scope or will not result in an abuse of market power.[5] Congress clearly intended that we grant exemptions and rely on "after the fact" remedies, including revocation,[6] to correct any abuses of market power. The fundamental purpose of the exemption process was to allow the Commission to grant exemptions from those requirements of the Act where deregulation would be consistent with the policies of Congress.[7]

The use of exemption here fulfills this legislative directive. This class exemption is designed to merely codify existing practice: exemption is presently the standard method used to acquire Commission approval for acquisitions and operations. It is designed to meet the need for expeditious handling of a large number of requests that are rarely opposed. In most instances, the transactions under this proposal will involve resumed or continued rail service with no change in operations. This exemption is designed to reduce regulatory delay and costs.

Several protestants argue that the findings needed to grant an exemption under section 10505 cannot be made for *all*, or substantially all, acquisitions and operations normally governed by section 10901. They cite two cases to support this proposition, citing Finance Docket No. 30663, *Chicago Cen. & P.R.R. Co.–Purchase (Portion), Trackage Rights, and Securities Exemption*

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[5] For a discussion of the legislative history of the Commission's exemptive power, see *Simmons v. ICC*, 697 F.2d 326, 334-342 (D.C. Cir. 1982).

[6] H.R. Rept. 1430, 96th Cong., 2d sess. 105 (1980).

[7] *Id.*

(Chicago), set for modified procedure in decision (not printed) served September 17, 1985; and Finance Docket No. 30439, *Gulf & Miss. R.R. Corp.–Purchase (Portion)–Exemption–I.C.G. R.R. Co., (Gulf)* (not printed), served January 2, 1985. However, in *Gulf* and *Chicago* the Commission made the required findings and granted an exemption. The Commission has yet to decide a single case involving the type of limited transactions included here, in which it could not make the required findings. However, the fact that in the future there may be a few proposals out of hundreds that require an investigation does not preclude us from concluding that regulation of *substantially all* of these transactions is not necessary to carry out the national rail transportation policy. This conclusion is completely consistent with the legislative directive concerning the Commission's exemption power.

Under the new rule, class exemptions may still be reviewed by the Commission. Any affected party can file a petition to revoke under section 10505(d) and attempt to show that regulation is necessary to carry out the rail transportation policy. In light of the explicit legislative directive to grant exemptions and then rely on after-the-fact remedies, including revocation, the potential for total or partial reimposition of regulation is always present. Accordingly, we reject protestants' argument that an after-the-fact remedy is not satisfactory. Transactions under this class exemption involve the transfer of discrete, defined property that would not be "lost" in the property of the acquirer. Thus, any transaction could be reversed in whole or in part, and we specifically reserve the right to require divestiture to avoid abuses of market power resulting from the transaction, or to regulate in accord with the provisions of the rail transportation policy.

Some protestants fear that this proposal will be used by class I railroads to divest themselves of marginally profitable lines. They are concerned that this will result in a transfer of ownership to a party who is not financially viable or lead to inferior service. The three cases cited to support this concern involved purchases of lines that were being abandoned.[8] In these cases, if it were not for the operations by the shortline, rail service would have ended at an earlier date, and there was no negative impact on service to the public as a result of the transactions. Additionally, insolvency by three small railroads attempting to improve unprofitable lines of class I railroads that were to be abandoned is not indicative of the financial stability of numerous other shortlines.

Commentators' concerns about the financial viability of new carriers are not supported by any specific evidence. Illinois Department of Transportation states that its records show that the Commission has approved 10 exemption petitions in Illinois. Six have resulted in apparently viable operations; the two carriers that failed (Prairie Trunk and Prairie Central) acquired lines that were being abandoned; and two did not consumate the transactions. While some new operators may, of course, not succeed in revitalizing unprofitable or marginal lines, we are not aware of many that have failed.

Moreover, we do not agree that the transfer of an active rail line under this exemption would result in a "de

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[8] *Prairie Trunk Railway–Acquisition and Operation*, 348 I.C.C. 832 (1977); Finance Docket No. 30039, *Prairie Central Railway Company–Abandonment Exemption–Between Paris and Mt. Carmel, IL* (not printed), served October 27, 1982; and Finance Docket No. 29158, *Seattle North Coast Railroad Company–Acquisition and Operation of a Line of Railroad in the State of Washington* (not printed), served March 26, 1981.

facto" abandonment, as argued by some protestants. Transfer of a line to a new carrier that can operate the line more economically or more effectively than the existing carrier servesd shipper and community interests by continuing rail service, and allows the selling railroad to eliminate lines it cannot operate economically. Transfer before a financial crisis (with attendant plans for abandonment) helps assure continued viable service.

Finally, we note that shortlines are dependent on local traffic for their survival, and thus have a greater incentive than class I carriers to provide local shippers with service tailored to their needs. Notably, no shippers opposes this class exemption. Shortlines frequently are able to reduce operating costs and thus keep rates competitive, No evidence was submitted to refute the tentative conclusion in the NPR at page 4 that:

> The transfer of abandoned or underused rail property for more efficient use by a railroad can be beneficial to the shippers on the line, to the community that the line runs through, and to the selling railroad. When a transfer occurs, shippers receive continued, if not enhanced service, while the selling railroad continues to receive the feeder traffic generated by the line as its junction point with the new operator.

We affirm this conclusion.

The NPR, at page 5, also contained a clear statement that employee protection would not be imposed on this class of transactions:

> We have consistently rejected these requests [for labor protection], reaffirming our longstanding, and judicially approved policy of not imposing labor protective conditions on acquisitions and operations under section 10901. We have stated that the policy of supporting continued operation of abandoned lines or abandonable rail lines is so strong

> that we will not impose labor protection even on established carriers acquiring or operating such lines. See, *e.g.*, *Tennessee Central Ry. Co.–Abandonment*, 334 I.C.C. 235 (1969); and Finance Docket No. 29923, *Acq. of Line of Chicago, R.I. & P. Ry. Co.–Ft. Worth-Dallas, TX* (not printed), served June 3, 1982. It is our established policy that the imposition of labor protective conditions on acquisitions and operations under 10901 could seriously jeopardize the economics of continued rail operations and result in the abandonment of the property with the attendant loss of both service and jobs on the line. [Footnote omitted.] In conclusion, we would not impose protective conditions if an application or individual exemption were filed. We propose to follow that policy should this class exemption be adopted. * * *

The Commission's well established discretion to impose labor protection under 49 U.S.C. 10901 was recently confirmed in *Black* v. *ICC*, 762 F. 2d 106, 111 (D.C. Cir. 1985), citing *Railway Labor Executives' Ass'n* v. *United States*, 697 F. 2d 285, 286 (10th Cir. 1983); *Simmons* v. *ICC*, 697 F. 2d 326, 340 (D.C. Cir. 1982); and *In re Chicago, Milwaukee, St. P. & P. R.R.*, 658 F. 2d 1149, 1169 (7th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982). The Railway Labor Executives' Association (RLEA) and United Transportation Union (UTU) offer no persuasive argument that employee protection under 10901 is mandatory. Instead, they argue that the Commission cannot exercise its discretion by making a class-wide finding that employee protection will not be imposed. If discretion could not be exercised by a class finding, it would be virtually impossible for an agency to use rulemaking instead of individual adjudication in

dealing with a particular category of cases. "[T]he choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947). Accord, *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, 435 U.S. 519, 524-525 (1978); *National Small Shipments Traffic Conf.* v. *ICC*, 725 F. 2d 1442, 1447-48 (D.C. Cir. 1984).

Exercising our discretion to not impose employee protection on this class of transactions is consistent with congressional intent.[9] In drafting the Staggers Act, Congress chose not to burden certain new operators with labor protection costs. For example, the acquirer of a rail line under 49 U.S.C. 10910, the feeder rail program, can elect to be exempt from nearly all provisions of the Interstate Commerce Act, including the labor protection provisions of 49 U.S.C. 10903.[10]

Additionally, 49 U.S.C. 10905, the provision governing offers of financial assistance, is silent on the issue of employee protection. After an analysis of congressional intent, the Commission exercised its discretion and did not impose employee protection on section 10905 transactions. *Illinois Central Gulf R. Co. – Abandonment*, 366 I.C.C. 911 (1983) affirmed, *Simmons* v. *I.C.C.* 760 F. 2d 126 (7th Cir. 1985), *pending cert.*, No. 85-438. We concluded at page 914:

> When this statute [10905] was enacted, Congress stated that one of its goals was to assist shippers who are sincerely interested in improving rail serv-

[9] The legislative history of the Staggers Act reflects a deliberate congressional option for "discretionary" rather than "mandatory" labor protection in section 10901. H.R. Rept. 1430, *supra* n. 6, at 115-16.

[10] Discussed in detail in *Simmons* v. *I.C.C.*, *supra* n. 5, at 341.

> ice. [citation omitted]. [Employee protective] conditions are inconsistent with these goals since they will render acquisition more costly and, therefore, deter efforts which otherwise are to be encouraged. [Footnote omitted.]

Employee protection is also inconsistent with our goals in granting this class exemption and would discourage acquisitions and operations that should be encourage. The record supports a conclusion that the acquirer would not be able to complete the transaction if those conditions were imposed.[11] RLEA and UTU have not demonstrated a need for employee protection either in past individual exemption requests or in this class exemption. There is no reason to impose the potential expense and burden of employee protection on an acquirer where there is not likely to be a demonstrated need.

To date most exemptions have involved abandoned lines, and employee protective conditions had already been imposed on the abandoning-selling carrier in the abandonment proceeding. In those instances not involving abandoned lines, labor has on occasion requested that conditions be imposed on a selling carrier. Prior to the late 1970's, the Commission did not have a clear policy concerning imposing employee protective conditions on a seller. With the bankruptcy of Chicago, Rock Island and Pacific Railway Company, Debtor (William M. Gibbons, Trustee), (Rock Island) and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor, many shortlines sought to acquire marginal or abandoned lines. Faced with the need to encourage continuation of rail service, the Commission adopted the

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[11] See comments filed by: Pinsly Railroads, Association of American Railroads (AAR) at 12; Indiana HI-Rail at 3; Rail Tex at 2; Tuscola & Saginaw Bay at 2; and General Electric Credit Corporation at 2.

present policy of not imposing conditions on the buyer or the seller.[12] We reasoned that there are costs associated with labor protection, and these costs would result in an increased selling price. Thus, the acquirer would indirectly bear these costs. In addition, in transactions under section 10901, operations are continuing and jobs for rail employees will continue to be available. Thus, railroads seeking to rid themselves of marginal lines should be encouraged to sell to shippers, shortlines, communities, and other mainline carrier who seek to continue operations over these lines. If labor protective conditions are imposed, the economic justification for transfer of a line is diminished if not negated. Accordingly, for these reasons and the reasons discussed above, no conditions will be imposed as a matter of course on the seller in a proposal using this class exemption.

In view of labor's lack of demonstrated need, the availability of revocation, congressional and Commission policies encouraging continued rail operations, and the likelihood that labor conditions would jeopardize the transaction and the economics of continued operations, we will exercise our discretion and not impose employee protective conditions on this class of transactions.

In an extraordinary case, a protesting labor union may seek protection by way of a petition to revoke under 10505(d). If an exception showing of circumstances justifying the imposition of labor protection is made, the Commission is empowered to revoke the exemption, in whole or in part, and impose labor protection. However, we will respond summarily to unsupported or otherwise *pro forma* requests for labor protection.

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[12] See *Knox and Kane R. Co.—Petition for Exemption*, 366 I.C.C. 439, 441-444 (1982); and *Common Carrier Status of States, State Agencies*, 363 I.C.C. 132, 136 (1980).

Several railroads argue that the Commission's authority to impose labor protection is limited by the plain language of section 10901(e) to situations where a rail "carrier propose[s] both to construct and operate a new railroad line pursuant to this section." [Emphasis added.] In view of our general holding, we need not and will not resolve this here. We note only that, while amendments to the Interstate Commerce Act reflect a disinclination towards routinely-imposed labor protection, our regulatory authority is both express and implied and early cases on the subject find implied authority to impose labor protection. See *United States* v. *Lowden*, 308 U.S. 225, 239-40 (1939).

RLEA and UTU also argue that it is "premature" to adopt an exemption that is at odds with legal arguments made by RLEA and UTU in several cases pending review. However, pending court cases cannot restrict an agency's docket in the manner advocated; settled principles of administrative law preclude that. The Administrative Orders Review Act ("Hobbs Act"), 28 U.S.C. 2342, *et seq.*, confers "exclusive jurisdiction" on a single court of appeals to enjoin or set aside a particular Commission rule or order, 28 U.S.C. 2349, and to stay the agency's order *pendente lite* or permanently. *Id.* That jurisdiction does not extend to other Commission proceedings, even those premised on the validity of an order under judicial challenge. Thus, the Commission is under no legal obligation to stay its present administrative proceeding until various court cases are decided. Additionally, the argument advanced in the cases cited by RLEA and UTU do not persuade us that the legal positions adopted in this exemption proceeding are in error.[13]

[13] In the cases cited by RLEA, the challenge centers on the statutory classification of the transactions. RLEA claims that the

RLEA and UTU further challenge the inclusion of "incidental trackage rights" in this class exemption. For clarity, we define "incidental trackage rights" as a grant of trackage rights by the seller, or the assignment of trackage rights to operate over the line of a third party, that occurs at the time of the acquisition or operation. For the reasons noted above, the pending case cited by RLEA, *RLEA* v. *ICC, et al.*, D.C. Cir., No. 85-1443, does not make our action premature (RLEA has now moved for voluntary dismissal). Recently in *Black* v. *ICC, supra*, at 110-11, 114-15, the D.C. Circuit reaffirmed two Seventh Circuit decisions that section 11343 governs only transactions between two or more carriers (*In Re Chicago, Milwaukee St. P. & P.R.R., supra*, and *Illinois* v. *United States, supra*). Thus, trackage rights involving only one carrier or an abandoned line are properly included in this class exemption.

A few States are concerned that this proposal will result in a shortened time period for comment before the proposal becomes effective. Generally, exemptions have a 30-day effective date; however, many exemptions include a request for an immediate effective date that is usually granted. Our experience has shown that there is generally strong support for individual exemption requests to be handled expeditiously so that rail service will not be interrupted. It has been our experience that affected shippers and communities *do not seek* a longer period for comment, even when the decision is effective immediately. Although the comment period is rarely used to oppose individual exemptions, a few State agencies nevertheless seek to have the proposed rules modified to include a notice and comment

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various transactions should have been processed under section 10903 (abandonments) or section 11343 (consolidations, acquisitions and trackage rights involving more than one carrier).

period. We conclude that there has been no showing of a benefit from a notice and comment period that outweighs the benefit of expeditious handling. Doing so would be inconsistent with the intent of this class exemption – to streamline current procedures. We note that, as a practical matter, State and local governments receive actual notice well before the proposal is filed. Local interests and government entities are often involved in the early stages of these proposals and frequently provide funding and loan guarantees. Additionally, no notice is given today before an individual exemption request is filed, and experience has shown that no hardship results.

Finally, we will clarify a statement in the NPR that if the notice of exemption contains false or misleading information it will be revoked. Consistent with other class exemptions, if the notice contains false or misleading information it is void *ab initio* [See 49 CFR 1152.50(d)(3)]. Revocation, as discussed above, is a remedy available under 10505(d). These petitions may be filed pursuant to 49 CFR Part 1115 or Part 1117. This minor modification is included in the final rule.

We also clarify that this exemption includes a change in operators, either carrier or noncarrier, if the lease remains a 10901 transaction.

A number of parties suggested that the information required in the notice be broadened to include more detailed financial and operating data. Others request that we require, among other things, negotiation between competing carriers. We have reviewed our experience under the many individual exemptions pro-

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various transactions should have been processed under section 10903 (abandonments) or section 11343 (consolidation, acquisitions and trackage rights involving more than one carrier).

ceedings we have decided to date. The vast majority of these cases have been processed with far less financial and operating information, to the apparent satisfaction of the affected shipper and carrier parties. Moreover, those directly involved (including the State) are, in fact, well aware of the financial condition of the potential acquirer, expected traffic revenues, volume and commodities, as well as intended operation.

We have considered the proposed rules with these conclusions in mind, and will eliminate proposed rules 1150.33(f) and (h) as unnecessary and potentially misleading. We also do not think it would be productive to impose a negotiation requirement in all cases despite the fact that only the very rare case raises any competitive issues. While we do not minimize these concerns, we believe the revocation procedure is adequate and appropriate to handle the few unique cases, and a petition for stay can also be filed in the exceptional case. We have and will continue to handle these cases expeditiously.

We conclude that exemption of these transactions will foster the rail transportation policy of 49 U.S.C. 10101a by minimizing the need for Federal regulatory control over the rail transportation system, ensuring the development and continuation of a sound rail transportation system, fostering sound economic conditions in transportation, reducing regulatory barriers to entry, and encouraging efficient rail management. Therefore, we find that the continued regulation of acquisitions and operations under 49 U.S.C. 10901 is not necessary to carry out the national rail transportation policy.

We further find that these transactions will not result in an abuse of market power. Proposals under this class exemption generally will maintain the *status quo* and will not change the competition situation. The vital in-

interests of shippers, communities, and carriers will be served by this exemption because it will result in the continuation of service that might otherwise be lost. Accordingly, we adopt the NPR.

Other exemptions that may be relevant to a proposal under this Subpart are the class exemption for control at 49 CFR 1180.2(d)(1) and (2), and the exemption from securities regulation at 49 CFR 1175.

We find:

1. Regulation of acquisitions and operations of railroads under 49 U.S.C. 10901 is not necessary to carry out the rail transportation policy and is not necessary to protect shippers from the abuse of market power.

2. We affirm the conclusions expressed in the NPR that this action will not have a significant economic impact on a substantial number of small entities, because it imposes no new requirements on them.

3. This action will not significantly affect either the quality of the human environment or energy conservation.

Authority: 49 U.S.C. 10321, 10505, and 10901: and 5 U.S.C. 553.

VICE CHAIRMAN SIMMONS, concurring:

I would have granted the notice requirement proposed by some States. I cannont agree with the majority's conclusion that there has been no showing of a benefit from a notice and comment period. Recently, State Governments have become actively involved in attracting new businesses and helping marginal business already there. New railroads may still have to comply with certan State laws or regulations dealing with such matters as incorporation, and some may need help in financing new operations or locating new shippers to

their lines. A simple, inexpensive notice provision directed toward designated State agencies may ease and expedite matters for new and struggling rail operations.

Except for the small disagreement expressed above, I approve this class exemption. As the decision states, it will encourage and enhance several goals for the national rail policy. This exemption is designed to encourage *viable* new class III railroads. In order to make the system work, however, large railroads must help. They must consider the special financial needs of the new short lines and the efficiencies they may produce. To promote the national rail policy and the public interest, large railroads should, when possible, quote and participate in joint rates which provide fair divisions to their new short line connections.

COMMISSIONER LAMBOLEY, concurring in part, dissenting in part:

I believe exemption is appropriate for the class of transactions generally associated with the establishment, or continuation of short line rail service. Such integrated transactions have customarily included proposals for acquisition or substitution, operation, and control combined with incidental trackage rights agreements, as well as necessary financing arrangements. Recognizing the need to facilitate continued, even competitive, rail service, we have in the past customarily granted exemption from relevant statutes on a case-by-case basis to achieve that purpose based on appropriate findings under section 10505.

The class exemption here granted flows from the aggregate of those cases, but should *not* be read to encompass those more expansive situations which are not of

limited scope, nor otherwise without concern for potential market abuse.[14]

Moreover, while exemption is appropriate, I am persuaded by certain comments that it should include service of notice on State authorities together with relevant financial and operational information. Such informational notice would provide knowledge to aid those economically interested in evaluating the impact and viability of the proposed transactions.

Finally, I do not share the majority's analysis of employee protection issues. Although section 10901, employee protective conditions are matters within the Commission's discretion, this exemption fails to either articulate the criteria or identify the circumstances upon which such discretion is exercised in favor of these conditions. Rather, the Commission in essence finds that it has not imposed such conditions in the past, and holds that it anticipates no need to do so in the future,

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[14] See *e.g.*, F.D. No. 30439, *Gulf & Miss. R.R. Corp.–Purchase Exemption I.C.G. R.R.*; (not printed) served January 2, 1985, and F.D. No. 30663 *Chicago Cent. & Pac. R.R. Co.–Purchase Trackage Rights and Securities Exemption* I, (not printed) served September 17, 1985 and II (not printed) served December 24, 1985. In both cases the Commission ultimately granted exemptions. However, it did so in each instance, only after commencing investigation and discovery coupled with the subsequent withdrawal of opposition reflecting negotiated settlement of market issues allowing the Commission to find and conclude that the proposed transactions were essentially free from potential market abuse. Indeed, had those circumstances not occurred, exemption would not have been appropriate in light of fact patterns involving substantial number of multi-state rail miles, shippers and employees, all of which removed the cases from being fairly considered as "limited in scope" or easily remedied after-the-fact by revocation of exemption.

although it does allude to the possibility in an "extraordinary case."

Precedent other than that historically recalled in the decision, evidences recent Commission and judicial approval for the imposition of protective conditions in section 10901 cases.[15]

Moreover, this exemption presumes that all relevant transactions fall within section 10901. However, prior cases evidence that section 11343 may apply to aspects of the integrated transactions generally proposed. Thus labor protection is required.[16]

The majority seems to view the labor protection issue only in the context of employees as being represented by a labor organization and an assessment of the cost impact based on negotiated labor agreements.

This exception expressly includes the substitution of one operator for another, which may merely involve the replacement of one short line operation by another, neither of which may necessarily have employees represented by any labor organization or working under a labor agreement.[17] Consequently, assumptions re-

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[15] See e.g., *Durango & Silverton N.G.R. Co.–Acquisition & Operations*, 363 I.C.C. 292 (1979), affirmed *RLEA* v. *U.S.* F. 2d 285 (10th Cir. 1983); *Prairie Truck Railway–Acquistion and Operation*, 348 I.C.C. 832 (1977) affirmed *People of State of Illinois* v. *U.S.*, 604 F. 2d 519 (7th Cir. 1979); see also *Cadillac & Lake City Ry. Co.–Acquisition & Operation*, 320 I.C.C. 617 (1964).

[16] See e.g., F.D. No. 30682, *Hammermill Paper Co.–Exemption*, (not printed) served August 21, 1985 and F.D. No. 30657, *Green Hills Rural Development, Inc. & Chillicothe Southern Railroad Co. supra.*

[17] See e.g., F.D. No. 30657 *Green Hills Rural Development, Inc. & Chillicothe So. Ry. Co.–Exemption*, (not printed) served January 10, 1986, F.D. No. 30457 *San Diego & Imperial Valley R.R. Co.*, (not printed) served October 7, 1985; F.D. No. 30709, *Canonie Atlantic Co. and Canonie, Inc.–Exemption*, (not printed) served September 11, 1985.

garding cost impact based solely on collective bargaining agreements are inaccurate.

In my view, the decision on the employee protection issue is overboard and without substantial evidentiary support for this conclusion.[18] The class exemption need not include a blanket prospective findings that employee protective conditions are unnecessary. This approach does little to reduce the prospects of future litigation and jeopardizes the benefits this exemption otherwise seeks to provide by facilitating continued rail transportation service.[19] I would have preferred disposition of this issue on a basis that allows a time limited submission and decision on employee protection prior to the effective date of exemption.[20] This, I believe would avoid the more complex revocation proceedings or problems similar to those experienced in the handling of the *Maryland Midland* case, *supra*, n.5.

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[18] The decision also fails to address remedial procedures and burden of proof in the event revocation is sought in any particular instance to which the class exemption may arguably apply.

[19] See e.g., No. 30237, *Maryland Midland Group, Inc.–Exemption*, (not printed) served September 19, 1983, reopening denied (not printed) served March 14, 1985, review filed May 17, 1985, *UTU* v. *ICC* Case No. 85-1304 (D.C. Cir.), voluntarily reopened by Commission (not printed) served October 3, 1985.

[20] Cf. Motor Carrier Exemption at 49 CFR 1186.1 *et seq.*, codifying Ex Parte No. 55 (Sub-No. 57), *Exemption of Certain Transactions Under 49 U.S.C. 11343*, 133 M.C.C. 449 (1984).

It is ordered:

1. We adopt the Notice of Proposed Rulemaking and amend Part 1150 of the Code of Federal Regulations as set forth in the appendix to this decision.

2. This decision is effective February 17, 1986.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Taylor, Sterrett, Andre, Lamboley, and Strenio. Vice Chairman Simmons concurred with a separate expression. Commissioner Lamboley concurred in part, and dissented in part with a separate expression.

APPENDIX

Title 49, Subtitle B, Chapter X, Part 1150 of the Code of Federal Regulations will be amended as follows:

Subpart D—Exempt Transactions

Sec.

Subpart D Exempt Transactions

§ 1150.31 *Scope of exemption.*

Except as indicated below, this exemption applies to all acquisitions and operations under section 10901 (See 1150.1, *supra*). This exemption also includes: (1) acquisition by a noncarrier of rail property that would be operated by a third party; (2) operation by a new carrier of rail property acquired by a third party; (3) a change in operators on the line; and (4) acquisition of incidental trackage rights. Incidental trackage rights include the

grant of trackage rights by the seller, or the assignment of trackage rights to operate over the line of a third pary that occur at the time of the exempt acquisition or operation. This exemption does not apply when a class I railroad abandons a line and another class I railroad then acquires the line in a proposal that would result in a major market extension as defined at 49 CFR 1180.3(c).

Other exemptions that may be relevant to a proposal under this Subpart are the exemption for control at 49 CFR 1180.2(d)(1) and (2), and the exemption from securities regulation at 49 CFR 1175.

§ 1150.32 ***Procedures and relevant dates***

(a) To qualify for this exemption, applicant must file a verified notice providing details about the transaction, and a brief caption summary, conforming to the format in 1150.34, for publication in the Federal Register.

(b) The exemption will be effective 7 days after the notice is filed. The Commission, through the Director of the Office of Proceedings, will publish a notice in the Federal Register within 30 days of the filing. A change in operators would follow the provisions at 49 CFR 1150.34, and notice must be given to shippers.

(c) if the notice contains false or misleadig information, the exemption is void ab initio. A petition to revoke under 49 U.S.C. 10505(d) does not automatically stay the exemption.

§ 1150.33 ***Information to be contained in notice***

(a) the full name and address of the applicant;

(b) the name, address, and telephone number of the representative of the applicant who should receive correspondence;

(c) a statement that an agreement has been reached or details about when an agreement will be reached;

(d) the operator of the property;

(e) a brief summary of the proposed transaction, including (i) the name and address of the railroad transferring the subject property, (ii) the proposed time schedule for consummation of the transaction, (iii) the mile-posts of the subject property, including any branch lines, and (iv) the total route miles being acquired;

(f) a map that clearly indicates the area to be served, including origins, termini, stations, cities, counties, and States; and

§ 1150.34 *Caption Summary*

The caption summary must be in the following form. The information symbolized by numbers is identified in the key below:

INTERSTATE COMMERCE COMMISSION
NOTICE OF EXEMPTION
Finance Docket No.
(1)—EXEMPTION (2)—(3)

(1) has filed a notice of exemption to (2) (3)'s line between (4). Comments must be filed with the Commission and served on (5). (6).

The notice is filed under 49 CFR 1150.31. If the notice contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption

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Key to symbols:

(1) Name of entity acquiring or operating the line, or both.

(2) The type of transaction, *e.g.*, to acquire, operate, or both.

(3) The transferor.

(4) Describe the line.

(5) Petitioners representative, address, and telephone number.

(6) Cross reference to other class exemptions being used.

under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

By the Commission, Chairman Gradison, Vice Chairman Simmon, Commissioners Taylor, Sterrett, Andre, Lamboley, and Strenio. Vice Chairman Simmons concurred with a separate expression. Commissioner Lamboley concurred in part, and dissented in part with a separate expression.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-2581

BURLINGTON NORTHERN RAILROAD COMPANY, APPELLEE

v.

UNITED TRANSPORTATION UNION, APPELLANT

FRED A. HARDIN, J. W. REYNOLDS, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, J. F. SYTSMA AND W. C. WALPERT

RAILWAY LABOR EXECUTIVES' ASSOCIATION,

v.

BURLINGTON NORTHERN RAILROAD COMPANY, APPELLEE

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, UNITED TRANSPORTATION UNION, APPELLANT

No. 87-2600

BURLINGTON NORTHERN RAILROAD COMPANY, APPELLANT

v.

UNITED TRANSPORTATION UNION, APPELLEE

FRED A. HARDIN, J. W. REYNOLDS, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, J. F. SYTSMA AND W. C. WALPERT.

RAILWAY LABOR EXECUTIVES' ASSOCIATION,

v.

BURLINGTON NORTHERN RAILROAD COMPANY, APPELLANT

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
BROTHERHOOD OF LOCOMOTIVE ENGINEERS, UNITED
TRANSPORTATION UNION, APPELLEE

Appeal from the United States
District Court for the
Western District of Missouri

Submitted: December 15, 1987
Filed: May 31, 1988

Before HEANEY, ARNOLD and FAGG, Circuit Judges.

HEANEY, Circuit Judge.

I. *Overview*

Burlington Northern Railroad Company (BN) announced its intention to sell a section of its rail lines to the Montana Rail Link (MRL), a newly formed corporation. This type of transaction was recently exempted from Interstate Commerce Commission (ICC) approval requirements, which generally involved the imposition of labor protective conditions. *See Ex Parte No. 392 (Sub. No. 1), Class Exemption for the Acquisition and Operation of Rail Lines under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1986), *review denied sub nom. Illinois*

Commerce Comm'n. v. ICC, 817 F.2d 145 (D.C. Cir. 1987) (*Ex Parte No. 392*). After unsuccessfully attempting both to engage BN in negotiations over the effects of the sale on BN employees and later to enjoin the sale, the United Transportation Union (UTU) threatened to strike. BN sought a preliminary injunction against the strike. The district court denied BN's request, finding the Norris-LaGuardia Act, 29 U.S.C. §§ 110-115 (Norris-LaGuardia) prohibited such relief. It did, however, grant an injunction pending review by our Court. On appeal, BN claims that Norris-LaGuardia must be accommodated to the action of the ICC in *Ex Parte No. 392*, and thus cannot bar an injunction. Alternatively, it argues that the Railway Labor Act, 45 U.S.C. § 151-188 (RLA), prohibits the strike because the UTU has not exhausted major dispute procedures under the Act.

We affirm the decision of the district court insofar as it held that Norris-LaGuardia prevents the issuance of an injunction here, and we dissolve the injunction issued by the district court pending this appeal. Second, we find the RLA's major dispute procedures are, in this instance, superseded by the terms of the Interstate Commerce Act, 49 U.S.C. § 10101-11917 (ICA), and thus cannot bar the strike.

II. *Factual Background*

In July, 1987, BN announced its intention to lease approximately 830 miles of its trackage to MRL, a newly formed corporation. These rail lines extend from Huntley, Montana, to Sand Point, Idaho. BN also proposed to sell various branch lines, equipment, personal property, and facilities to MRL. In the past, this transaction would have been contingent upon the approval of

the ICC, and labor protective conditions would normally have been imposed for the protection of BN employees. However, recently, such sales have been exempted from ICC approval procedures. *See Ex Parte No. 392*, 1 I.C.C.2d 810 (1986).

In compliance with *Ex Parte No. 392*, MRL filed a petition for exemption. Under the terms of *Ex Parte No. 392*, such exemptions are automatically granted seven days after they are filed. *See* 49 C.F.R. § 1150.32(b). Several parties requested a stay of the exemption. The ICC, however, denied those requests and the exemption issued on July 31, 1987. Finance Docket No. 31087, decided July 31, 1987, *Montana Rail Link, Inc.–Exemption Acquisition and Operation–Certain Lines of the Burlington Northern Rail Company*. Subsequently, a number of the unions representing BN employees, including the UTU, filed petitions to revoke the exemption. These petitions requested labor protection for BN employees affected by BN's action. The ICC has not yet ruled on these petitions. The transaction was closed on October 31, 1987, after the ICC made a specific finding that it was "in the public interest" and after the unions unsuccessfully sought an injunction against the transaction in the United States District Court for the District of Montana. *United Transp. Union v. Burlington Northern R.R.*, 672 F. Supp. 1579 (D. Mont. 1987).

Before the Montana district court, the unions sought to enjoin the sale and maintain the status quo until the arbitration and mediation provisions of the RLA were exhausted. The district court refused to grant this request. Relying on *Railway Labor Executives' Ass'n v. Staten Island R.R.*, 792 F.2d 7 (2d Cir. 1986), *cert. denied*, ____ U.S. ____, 107 S.Ct. 927 (1987), it found that the mandatory bargaining procedures of the RLA

would frustrate the action of the ICC and thus did not provide the court with authority to issue an injunction. 672 F. Supp. at 1582. However, the court, citing *Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R.*, 831 F.2d 1231 (3d Cir. 1987), did note that there was no inherent incompatibility between the ICC's action and the provisions of Norris-LaGuardia, thus suggesting that Norris-LaGuardia would bar an effort to enjoin a subsequent strike by the unions. 672 F. Supp. at 1582-83 n. 3. The UTU has appealed this decision to the Ninth Circuit.

After the Montana district court denied the unions' motion to enjoin the sale, the UTU threatened a nationwide strike against BN. BN immediately sought a temporary restraining order and a preliminary injunction from Judge Joseph E. Stevens of the United States District Court for the Western District of Missouri. *See Burlington Northern R.R. v. United Transp. Union*, No. 86-5013-CV-SW-8, slip op. (W.D. Mo. Nov. 16, 1987). The court granted the temporary restraining order but subsequently denied the request for a preliminary injunction. In declining to issue a preliminary injunction, Judge Stevens placed primary reliance on *Pittsburgh and Lake Erie*, 831 F.2d 1231. A few hours later, the court granted BN's motion for an injunction pending appeal. We denied UTU's motion to suspend the injunction pending appeal and directed BN to avoid further layoffs until we had decided the matter.

On appeal, BN contends that the ICA vests the ICC with exclusive and plenary jurisdiction to resolve disputed issues. Thus, they argue, Norris-LaGuardia does not bar an injunction against the proposed strike. Second, BN maintains the RLA prohibits the strike since UTU has not exhausted major dispute procedures.

III. *The ICA, the RLA and Norris-LaGuardia*

A. Statutory Framework

1. The Interstate Commerce Act (ICA)

The ICA is fundamentally a statute designed to regulate commerce. Its goal is to make commerce flow smoothly to the benefit of both American industry and consumers. The Act seeks to ensure fair shipping rates, safety and efficiency in transportation, and to preserve the viability of various modes of transportation. The ICA also seeks to discourage harmful monopolistic practices, detrimental state regulation, and labor strife – all of which tend to impede commerce to the detriment of industry and consumers. *See* 49 U.S.C. §§ 10101, 10101a.

The ICA generally requires that before a railroad acquires an additional line or abandons a line, the rail carriers involved in the transaction must obtain the approval of the ICC. 49 U.S.C. §§ 10901, 10903. Pursuant to the ICA's goal of preventing labor strife by "encourag[ing] fair wages and safe and suitable working conditions in the railroad industry," *see* 49 U.S.C. § 10101a(12), approval by the ICC has in the past generally required the imposition of plans to compensate workers displaced by the particular transaction. These plans are called labor protective conditions or labor protective agreements. Under its authority, the ICC has developed standard labor protective conditions for particular types of transactions.[1]

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[1] When the transaction involves the sale of a rail line, the ICC imposes its *New York Dock* conditions upon the parties. *See New York Dock Ry. – Control – Brooklyn E.D. Terminal*, 360 I.C.C. 60 (1979), *aff'd*, 609 F.2d 83 (2d Cir. 1979). If it is a case of abandonment, it imposes *Oregon Short Line III* conditions. *See Oregon Short Line R.R. – Abandonment*, 360 I.C.C. 91 (1979).

In the early 1970's the railroad industry, for a variety of reasons, began to experience economic difficulty. In 1976, concern about the "financial health" of this industry prompted Congress to pass the Railroad Revitalization and Regulatory Reform (4-R) Act, Pub. L. No. 94-210, 90 Stat. 31 (1976). The 4-R Act empowered the ICC, *inter alia*, to exempt individual transactions or classes of transactions from the Act's prior approval requirements (and thuss avoid the cost of labor protective conditions) Pub. L. No. 94-210, 90 Stat. at 42.

Four years later, in another deregulatory effort, Congress passed the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980). In the Staggers Act, Congress attempted to "reduce regulatory barriers to entry into and exit from the [railroad] industry." *Id.* § 101(a), 94 Stat. 1897, codified at 49 U.S.C. § 10101a. Specifically, the Act broadened the exemption provisions codified at 49 U.S.C. § 10505, to provide that exemptions "shall" be granted to carry out the Staggers Act national rail policy. 94 Stat. at 1913.

In 1986, the ICC, in an ex parte rule-making procedure, exercised its new section 10505 power to exempt, as a class, line sales to "new carriers"[2] from the detailed approval procedures required under section 10901. *See Ex Parte No. 392*, 1 I.C.C.2d 810 (1986). To facilitate these sales, the ICC further prescribed an expedited approval procedure in place of the procedure that would otherwise apply under section 10901(b). Under the class exemption, sales to new carriers are authorized to go forward seven days after the parties file verified notices with the ICC. *Id.* at 820, *see also* 49 C.F.R. § 1150.32(b).

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[2] "New carrier" means a newly formed railroad not already subject to the ICA.

The ICC's action in *Ex Parte No. 392* was appealed to the United States Court of Appeals for the District of Columbia Circuit. That court denied review of the ICC's action without an opinion. *Illinois Commerce Comm'n v. ICC*, 817 F.2d 145 (D.C. Cir. 1987).

2. The Railway Labor Act (RLA)

The RLA regulates the relationship between railroads and their employees. The purposes of the Act include avoiding interruption to commerce, ensuring worker freedom of association and the right to unionize, providing for the "prompt and orderly" settlement of employment related disputes, and securing the "complete independence" of railroads and their employees in matters of self-organization and in carrying out the Act's other purposes. *See* 45 U.S.C. § 151a.

Under the RLA, controversies over proposed changes in collective bargaining agreements are termed "major" disputes (to be distinguished from "minor" disputes over the "interpretation or application" of existing agreements and practices). *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 723-24 (1945). Under §§ 2 Seventh and 6 of the Act, a party desiring to change a working condition embodied in an existing agreement, or to bring a condition not previously covered within an agreement, must serve a "§ 6 notice" upon the opposing party. 45 U.S.C. §§ 152 Seventh, 156. The resulting major dispute is subject to dispute resolution including conferences, mediation, and, in some cases, proceedings before a presidential emergency board. 45 U.S.C. §§ 155, 156, 160. Until these procedures are exhausted, neither party may change the status quo, i.e., the "actual objective working conditions" in existence at the

beginning of the dispute. *Detroit & T. Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 149, 153 (1969).[3]

3. The Norris-LaGuardia Act

The Norris-LaGuardia Act withdraws jurisdiction from the federal courts in cases growing out of labor disputes. The Act clearly states:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as the terms are herein defined) from
> * * *
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment.

29 U.S.C. § 104.

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[3] The Act lacks any mechanism to compel agreement in major disputes. Binding arbitration of a major dispute is available only if both parties agree to it. *See* 45 U.S.C. §§ 155, 157; *Elgin J. & E. Ry.*, 325 U.S. at 725.

Section 3 of the RLA commits minor disputes over the "interpretation or application" of existing agreements and practices to the exclusive jurisdiction of Adjustment Boards, i.e. to "compulsory arbitration." *Brotherhood of R.R. Trainmen v. Chicago R. & I. R. R.*, 353 U.S. 30, 39 (1957); 45 U.S.C. § 153 First (i); *see Elgin J. & E. Ry.*, 325 U.S. at 724. If the resolution of a labor dispute arguably depends upon the interpretation or application of a collective bargaining agreement or established past practice, the dispute must go to an Adjustment Board, not to a court. *Brotherhood of Maintenance of Way Employes v. Burlington Northern Ry.*, 802 F.2d 1016, 1022 (8th Cir. 1986). While the controversy is pending before the Board, the carrier is free to apply its interpretation of the disputed agreement or past practices. *Id.*

The public policy behind Norris-LaGuardia is clearly stated in the Act. Specifically, the Congress found that prevailing socio-political and economic conditions prevented individual workers from obtaining "acceptable terms and conditions of employment." Therefore, Norris-LaGuardia sought to ensure workers the right to organize and conduct union activities "free from the interference, restraint, or coercion" of employers or their agents by means of labor injunctions. *See* 29 U.S.C. § 102.

B. Analysis

As noted above, the ICA is fundamentally a commerce statute directed toward ensuring the free flow of commerce. The RLA is a labor statute that orders the relationship between railroads and their employees. Norris-LaGuardia is a jurisdictional labor statute designed to deal with historical anti-union animus in the federal courts by withdrawing jurisdiction in cases growing out of labor disputes. Each of these congressional enactments are intended to be preeminent in terms of the subject matter they regulate. However, toward the periphery of the authority granted under each law, there exist overlapping powers and responsibilities which must be accommodated and harmonized.

For example, when the imperatives of labor statutes such as the RLA and Norris-LaGuardia conflict, the federal courts have determined that if the provisions of the RLA represent some "overriding, equally clear yet irreconcilable labor policy" which would be frustrated by the literal enforcement of Norris-LaGuardia's anti-injunction provisions, the latter act can be accommodated. *Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R.*, 831 F.2d 1231, (citing *Chicago & North Western Ry. v. United Transp. Union*, 402 U.S.

570 (1971); *Boys Market, Inc. v. Retail Clerk's Union Local 770*, 398 U.S. 235 (1970); *Brotherhood of Locomotive Eng'rs v. Louisville & Nashville R.R.*, 373 U.S. 33 (1963); *Brotherhood of R.R. Trainmen v. Chicago & Indiana R.R.*, 353 U.S. 30 (1957); *Brotherhood of Ry. Trainmen v. Howard*, 343 U.S. 768 (1952)).

Yet, the problem of harmonizing labor statutes with statutes in other fields – particularly those which encourage commerce and industrial expansion – presents far more difficult balancing problems. In this age of trade unions with nationwide membership, it is increasingly difficult to remember that without the clear protections erected by the Congress in Norris-LaGuardia, the RLA, and the National Labor Relations Act, 29 U.S.C. §§ 151-187, the right to organize, the right to bargain collectively, and the right to strike in the United States were simply untenable propositions.

The preamble to Norris-LaGuardia recognized this problem in stark terms. The statute withdrew jurisdiction from the federal courts to enjoin labor disputes in the realization that:

> under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, *the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment* * * *.

29 U.S.C. § 102 (emphasis added).

Moreover, the Supreme Court has recently recognized the fundamental importance of Norris-LaGuardia in terms of the viability of the labor movement:

> The Norris-LaGuardia Act . . . expresses a basic policy against the injunction of activities of labor unions.
>
> * * *
>
> The congressional debates over the Norris-LaGuardia Act disclose that the Act's sponsors were convinced that the extraordinary step of divesting federal courts of equitable jurisdiction was necessary to remedy an extraordinary problem.
>
> * * *
>
> The Norris-LaGuardia Act responded directly to the * * * pattern of injunctions entered by federal judges. "The underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial contruction."

Burlington Northern R.R. v. Brotherhood of Maintenance of Way Employes, 481 U.S. ____, 107 S.Ct. 1841, 1846-47 (1987) (citations omitted).

Finally experience shows that as the protections of labor statutes are diluted, even under the "neutral" terms of deregulatory actions by Congress, the economic power of employees is visibly diminished by both contracting the authority of their representatives to bargain on their behalf and by reducing the ranks of their organized membership.

With this in mind, we turn to the task of exploring the interplay between the ICA, the RLA, and Norris-LaGuardia.

Under the ICA, Congress sought to provide the ICC with the means to prevent labor strife by assuring "fair wages and working conditions in the railroad industry."

49 U.S.C. § 10101a(12). To accomplish this important *but limited aim*, Congress provided the ICC superseding authority to supervise and implement labor protective conditions in terms of acquisitions, sales, and abandonments of railroad lines. But it did so only insofar as this authority is necessary to "assure fair wages and working conditions" in order to ensure the free flow of commerce. In these narrow circumstances, the ICA supersedes the authority of the mandatory bargaining provisions of the RLA which provide an essentially duplicative or overlapping process designed to reach labor protective agreements. Were it otherwise, the ICC's authority in this area, and specifically its recent deregulatory actions, would be largely nullified. However, the ICA does not so easily supersede Norris-LaGuardia for, except where Congress has *specifically exempted the ICA from the operation of other laws and required mandatory labor protective conditions*, nowhere in the ICA is there any indication of its direct incompatibility with the anti-injunction statute. Clearly, Norris-LaGuardia says nothing about the methods by which labor protective agreements are made, but rather represents a completely independent *and very clear* decision by Congress to insulate labor disputes from the injunctive powers of the federal courts.

Our decision in *Missouri Pacific Ry. v. United Transp. Union*, 782 F.2d 107 (8th Cir. 1986) (per curiam), *cert. denied*, ___ U.S. ___, 107 S.Ct. 3209 (1987), when read in conjunction with *Railway Labor Executives' Ass'n v. Staten Island R.R.*, 792 F.2d 7 and *Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R.*, 831 F.2d 1231 illustrates implicitly the interaction of these three federal statutes.

In *Missouri Pacific*, we held that when a consolidation transaction subject to 49 U.S.C. §§ 11341, 11347,

statutory provisions which specifically *exempt carriers from all other law*[5] and *require mandatory employee protective conditions*[6], neither the RLA nor Norris-LaGuardia could operate to restrict the terms of the ICA. In the *Staten Island* case, the Second Circuit found, in a transaction governed by 49 U.S.C. § 10905 (similar to the transaction here in controversy), there was jurisdiction under the RLA in terms of the bargaining relationship between the railroad and the unions. However, the court found that the ICA's action approving the transaction withdrew from the courts the power under the RLA to "formulate a meaningful remedy without impinging on the ICC's order approving the sale in question."[7] 792 F.2d at 12, *see also United Transp. Union v. Burlington Northern R.R.*, 672 F. Supp. 1579,

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[5] 49 U.S.C. § 11341(a) provides:

> The authority of the Interstate Commerce Commission under this subchapter is exclusive. * * * A carrier, corporation, or person participating in [an] approved or exempted transaction is exempt from all other law, including State and municipal law, as necessary to let that person carry out the transaction. * * *

"[T]his subchapter" refers to Subchapter III of Chapter 113 of the ICA, §§ 11341-51, under which the transaction in *Missouri Pacific* was approved, and not 49 U.S.C. § 10901, Subchapter I of Chapter 109 of the Act, applicable here.

[6] 49 U.S.C. § 11347 provides:

> When a carrier is involved in a transaction for which approval is sought under [the consolidation provisions] of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement * * * protective of the interest of employees who are affected by the transaction * * *.

[7] In *Staten Island*, the viability of Norris-LaGuardia in terms of the ICA was not at issue.

1582-83. They thus dismissed the case under Fed. R. Civ. P. 12(b)(6).[8]

Finally, in the *Pittsburgh & Lake Erie* case, the Third Circuit, with a transaction identical to the one before us, faced a request by an employer railroad to accommodate Norris-LaGuardia to the ICA. The court refused to do so, recognizing both the overriding importance of Norris-LaGuardia and finding no irreconcilability between the ICC's authority over the bargaining process and Norris-LaGuardia's prohibition against injunctions. Specifically, the court stated:

> [None of the provisions] relied on by P & LE which makes the ICC's authority "exclusive" with respect to combinations of carriers, contains any language which would suggest Congress intended to override the anti-injunction policy of section 4 of the Norris-LaGuardia Act by the Interstate Commerce Act. * * * Neither the ICC nor P & LE have pointed to any language in the legislative history of any of the labor laws or the Interstate Commerce Act which suggests that the strong national policy embodied in the Norris-LaGuardia Act is to be subordinated to the ICC's authority to approve an acquisition of railroad property.

831 F.2d at 1235-36.

Thus, the interplay of these three statutes can be summed up as follows. When the ICA provides a specific exemption from all other law and mandates inescapable employee protective conditions under provisions such as 49 U.S.C. §§ 11341(a), 11347, it effectively supersedes

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[8] In *Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R.*, No. 87-3797, slip op. (3rd Cir. April 8, 1988), the Third Circuit in a carefully crafted opinion by Judge Becker, recently found that the ICC"s action in Ex Parte No. 392 did not preempt the RLA.

both the RLA and Norris-LaGuardia. If there is no exemption and specific protection is not mandated, the authority of the ICA only extends to the bargaining process concerning wages and working conditions. In these circumstances, while the bargaining provisions of the RLA are superseded, Norris-LaGuardia is unaffected and remains to protect the employees' interests.[9]

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[9] In *United Transp. Union v. Burlington Northern R.R.*, 672 F. Supp. 1579, the United States District Court for the District of Montana came to exactly this conclusion. This court, like ours, relying on *Staten Island*, found that mandatory bargaining provisions of the RLA were superseded by the terms of the ICA. However, the court, citing *Pittsburgh & Lake Erie*, found that the ICC's action did not affect the viability of Norris-LaGuardia. Specifically, the court stated:

> Both parties have brought to the attention of the court an opinion handed down by the Third Circuit on October 26, 1987, where the court reversed a district court decision enjoining a labor strike. The Third Circuit found that Section 4 of Norris-LaGuardia need not be accommodated to the Interstate Commerce Act. *Railway Labor Executives' Association v. Pittsburgh & Lake Erie R.R. Co.*, 831 F.2d 1231 (3d Cir. 1987).
>
> The case involved facts very similar to those in the instant case. The Railroad was selling its rail lines to a new non-carrier entity which filed for, and received, an exemption pursuant to section 10505 of the ICA. The union filed section 6 notices pursuant to the RLA and the railroad refused to negotiate. However, there the union chose to strike. Section 4 of the Norris-LaGuardia Act forbids federal district court injunctions against labor strikes. 29 U.S.C. § 104.
>
> *A strike by union members against their employer does not directly contradict or encroach upon the authority of the ICC. The authorization of the sale still stands, and at the same time the employees have the right to pressure the employer to negotiate labor protections. The case is distinguishable in that an injunction of the sale would itself directly contradict and in-*

Moreover, this notion of the viability of Norris-LaGuardia in the face of the supersedure of the RLA is clearly in line with what Congress intended. In examining the impetus behind the recent deregulatory efforts in the railroad industry, Congress has sought to free the union-management relationship from time-consuming, "process oriented" bureaucracy imposed by various regulatory statutes and to allow the sagacious invisible hand of the free market economy to reorder rapidly that industry's economic difficulties. Thus, while we agree with BN's contention that enforcing the mandatory bargaining provisions of the RLA might render the changes in the ICA without much practical force, we find, like the Third Circuit, no inherent incompatibility between these actions and Norris-LaGuardia. Clearly implicit in the congressional vision of a vigorous free market is the realization that all major participants in the economy must be left free to exercise their economic strength and thus return the economy to its natural order. We thus find it impossible to believe that Congress would leave the railroads free to exercise their economic power to advance their goals, yet forbid the unions to use their strength to protect the interests of their membership.

In the end, should Congress wish to accommodate Norris-LaGuardia to the ICC in this situation, it can do so explicitly. Such a decision concerning such a significant change in federal labor policy is too important to be found implicitly by a court in the interstices of a federal statutory scheme.

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fringe upon the authority of the ICC. Congress has given full authority over sales and acquisitions of railroads to the ICC pursuant to the ICA.

672 F. Supp. at 1582-82 n. 3 (emphasis added).

IV. *Conclusion*

In its decision in *Ex Parte No. 392*, the ICC has acted within its authority by exempting, as a class, sales to new carriers from the requirement of imposing labor protective conditions. Moreover, the ICC's authority to supervise and implement labor protective conditions in terms of sales, acquisitions, and abandonments by railway carriers insofar as this authority is necessary to "assure fair wages and working conditions" supersedes the authority of the mandatory bargaining provisions of the RLA. We thus dismiss BN's claim under the RLA.[10] However, we find no inherent incompatibility between the recent deregulatory efforts of the Congress and the ICC and the continued viability of Norris-LaGuardia in the circumstances presented here. We thus affirm the decision of the district court declining to issue an injunction against the proposed strike by the UTU and dissolve the temporary injunction put in place pending this appeal.

FAGG, Circuit Judge, dissenting.

The district court denied BN's motion for a preliminary injunction against UTU's threatened strike, dis-

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[10] We would alternatively dismiss BN's claim under the RLA on the merits. BN maintains that a strike by the UTU should be enjoined because the UTU did not invoke the major dispute resolution procedures of the RLA and thus must exhaust their remedies before they can strike. The UTU did, however, attempt to do so by serving a Section 6 notice, but was frustrated in this effort by an arbitration award holding that, under the applicable collective bargaining agreements, the Union had no right to serve such a notice before April 1, 1988. We believe the operative fact here is that BN itself changed the status quo without serving a Section 6 notice and would thus be barred from seeking injunctive relief by its own omission.

claiming jurisdiction to enjoin the strike on account of the Norris-LaGuardia Act (NLGA). *See* 29 U.S.C. § 104. I do not share the district court's view that injunctive relief is unavailable to protect an ICA order from disruption by a union strike that in essence challenges the terms of that order.

The court correctly observes that when the NLGA and the ICA overlap, they "must be accommodated and harmonized." *Ante* at 10. This accommodation is necessary because neither statute "may meaningfully be read in isolation * * * for they are in fact, an integrated plan of railroad regulation. And if, as is frequently the case in such undertakings, there be overlappings, '[w]e must determine * * * how far Congress intended activities under one of these policies to neutralize the results envisioned by the other.' " *Order of R.R. Telegraphers v. Chicago & N.W. Ry.*, 362 U.S. 330, 352 (1960) (quoting *Allen Bradley Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers*, 325 U.S. 797, 806 (1945)) (Whittaker, J., dissenting).

There is no dispute the ICC has discretionary authority to impose labor protective conditions in this type of transaction. *See* 49 U.S.C. § 10901(c)(1)(A)(ii); *Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R.*, 831 F.2d 1231, 1235 (3d Cir. 1987); *Winter v. ICC*, 828 F.2d 1320, 1323 (8th Cir. 1987). It is also clear the ICC has the power to grant or deny UTU's pending request for those conditions, *ante* at 4, and UTU will have access to judicial review of an adverse decision, *see* 28 U.S.C. § 2321(a). Simply stated, Congress has charged the ICC with the responsibility to impose protective labor conditions that are "necessary in the public interest" in section 10901 transactions. 49 U.S.C. § 10901(c)(1)(A)(ii).

The court holds, however, that when labor protective conditions are discretionary rather than mandatory, the

ICA cannot displace the NLGA's antiinjunction provisions because that situation presents no "direct incompatibility" between the NLGA and the ICA. *Ante* at 13. I believe the court and the Third Circuit have drawn an illusory distinction between mandatory and discretionary conditions. *See Railway Labor Executives' Ass'n,* 831 F.2d at 1334-37. This approach to the issue has led the court mistakenly to conclude the district court was correct in deciding it was without jurisdiction to enjoin the UTU strike, and it is at this point that I respectfully part company with the court.

What is really involved in this case is this: whether UTU, displeased with ICC approval of BN's sale of a section of its rail lines to MRL, may bypass the ICC and direct its displeasure at BN for the singular purpose of extracting concessions that are at odds with the terms of the ICC order. I think not, and I believe my view is at the heart of the decision in *Missouri Pacific Railroad v. United Transportation Union,* 782 F.2d 107 (8th Cir. 1986) (per curiam), *cert. denied,* 107 S. Ct. 3209 (1987) (*MoPac*). In adopting the district court's decision permitting the injunction, the court in *MoPac* stated:

> [A]llowing UTU to strike would be tantamount to saying that UTU has carte blanche authority to frustrate and avoid a material term of a consolidation approved by the ICC. Congress did not intend that affected employees have such power to block consolidations which are in the public interest. * * * [I]t is inconceivable that Congress intended that a labor union would be able to participate in ICC approval proceedings and then, if the union was dissatisfied with the result or a part thereof, strike a carrier to obtain the advantage it desired.

Id. at 112.

It is apparent a UTU strike here would be aimed at obtaining the essential equivalent of the same labor protective conditions UTU is actively seeking from the ICC. I am persuaded that in these circumstances, just as in cases in which protective conditions are mandatory, the NLGA cannot be used to thwart an ICC order approving the BN-MRL transaction. When viewed from this perspective the potential conflict, while undoubtedly relating to BN's relationship with its employees, does not bear the charactistics of an NLGA section 104 labor dispute. I believe Congress, through the ICA, has granted the ICC authority (subject to judicial review) to resolve conclusively the issues UTU seeks to raise by way of the threatened strike.

In sum, the UTU strike threat amounts to an unacceptable neutralization of congressional policy in favor of the ICC's exercise of expert authority to serve the public interest in the area of railroad service. I believe the provisions of the ICA embody the greater interest when a dispute involving a railroad and its employees has been triggered by an order of the ICC. In these circumstances, the competing aspects of the ICA and the NLGA should have been resolved by the district court in favor of the ICA. Thus, I would reverse the district court's order disclaiming jurisdiction to consider BN's injunction request.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX H

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 87-5071

RAILWAY LABOR EXECUTIVES' ASSOCIATION, APPELLANT

v.

CHICAGO AND NORTHWESTERN TRANSPORTATION COMPANY AND DAKOTA, MINNESOTA AND EASTERN RAILROAD, APPELLEES

STATE OF SOUTH DAKOTA, AMICUS CURIAE/APPELLEE

Appeal from the United States District Court for the District of Minnesota

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Submitted: December 18, 1987
Filed: May 31, 1988

Before LAY, Chief Judge, and HEANEY and MAGILL, Circuit Judges

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HEANEY, Circuit Judge.

In this appeal, the Railway Labor Executives' Association (RLEA) asks the Court to reverse the decision of the United States District Court for the District of Minnesota. The district court refused to enjoin the sale of a section of trackage by the Chicago & Northwestern Transportation Company (C&NW) to the

Dakota, Minnesota & Eastern Railroad (DM&E) until C&NW exhausted the mandatory bargaining requirements of the Railway Labor Act, 45 U.S.C. §§ 151-188 (RLA). Because we find the RLA in this circumstance superseded by the authority of the Interstate Commerce Act, 49 U.S.C. §§ 10101-11917 (ICA), we affirm the district court.

C&NW had sought for many years to divest itself of certain marginal or light density rail lines in South Dakota. Normally, the sale of abandonment of rail lines is subject to the approval of the Interstate Commerce Commission (ICC). *See* 49 U.S.C. §§ 10901, 10903, 10905. The ICC had in the past refused to allow C&NW to rid itself of these rail lines because of the adverse impact of such action on the State of South Dakota.

In January, 1986, the ICC, in an ex parte rulemaking procedure, exempted as a class the sale of rail lines to "new carriers" from the prior approval requirements of the ICA. *See Ex Parte No. 392 (Sub. No. 1), Class Exemption for the Acquisition and Operation of Rail Lines under 49 U.S.C. 10901*, 1 I.C.C. 2d 810 (1986), *review denied sub nom. Illinois Commerce Comm'n v. ICC*, 817 F.2d 145 (D.C. Cir. 1987) (*Ex Parte No. 392*). Following this change in ICC policy, C&NW agreed on July 2, 1986, to sell 826 miles of its rail lines and assign 139 miles of its South Dakota trackage to DM&E, a newly formed railroad.

Beginning in May of 1986, when they learned of the railroad's intention to sell, seven of the unions representing C&NW employees served notices on the C&NW as required under Section 6 of the RLA, 45 U.S.C. § 156. These notices informed C&NW of the unions' intention to negotiate agreements to require both advance notification of any proposed transfer of rail lines and appropriate employee protective conditions. The

unions further sought to obtain a pledge by C&NW to require DM&E to employ C&NW's collective bargaining obligations, and to apply appropriate employee protective arrangements. Under the terms of the RLA, these notices set in motion a lengthy bargaining process during which the status quo, i.e., the "actual objective working conditions" in existence at the beginning of the dispute, must be preserved. *Detroit & T. Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 149, 153 (1969).

While the parties engaged in discussions, C&NW continued with its plans to sell the South Dakota lines. Pursuant to this goal, both the C&NW and the DM&E filed verified notices with the ICC under *Ex Parte No. 392* to qualify for exemption from prior approval requirements. Once it became apparent that C&NW intended to consummate the sale, notwithstanding the fact that it had not complied with the mandatory bargaining requirements of the RLA, RLEA, an umbrella organization made up of representatives of the various rail unions representing C&NW employees, filed a complaint in the United States District Court for the District of Minnesota on August 19, 1986. In its complaint, RLEA sought a declaratory judgment that C&NW had an obligation under the RLA both to bargain over the proposed transfer and to maintain the status quo until that bargaining was concluded. RLEA also sought interlocutory and then permanent injunctive relief requiring C&NW to bargain and maintain the status quo. C&NW replied that the mandatory bargaining requirements of the RLA were preempted by the provisions of the ICA governing sales and labor protective conditions.

On August 27, 1987, the district court denied RLEA's motion for a preliminary injunction, declaring such

relief would "be clearly at loggerheads with the decision of the ICC, particularly as expressed in Ex Parte 392." Shortly after that ruling, C&NW and DM&E consummated the sale, and on September 5, 1987, DM&E began operating over its newly acquired trackage. Once the sale was consumated, RLEA concentrated its attack on C&NW's bargaining obligation and duty to maintain the employment status quo of its employees whom RLEA asserted where improperly affected. Both sides moved for summary judgment. On January 7, 1987, the district court orally denied RLEA's motion, again finding that the ICC's action in *Ex Parte No. 392* would be undermined if the provisions of the RLA were enforced and C&NW was required to bargain with the railroad unions. This appeal followed.

In *Burlington Northern R.R. v. United Transp. Union*, No. 87-2851, slip op. (8th Cir. May 31, 1988), a case decided today involving a similar railroad transaction exempted under *Ex Parte No. 392* from normal ICC approval requirements, we held that the provisions of the ICA government labor protective agreements supersede the mandatory bargaining requirements of the RLA. Specifically, we stated:

> Under the ICA, Congress sought to provide the ICC with the means to prevent labor strife by assuring "fair wages and working conditions in the railroad industry." 49 U.S.C. § 10101a(12). To accomplish this important *but limited aim*, Congress provided the ICC superseding authority to supervise and implement labor protective conditions in terms of acquisitions, sales, and abandonments of railroad lines. Yet it did so only insofar as this authority is necessary to "assure fair wages and working conditions" in order to ensure the free flow of commerce.

> In these narrow circumstances, the ICA supersedes the mandatory bargaining provisions of the RLA which provide an essentially duplicative or overlapping process designed to reach labor protective agreements.

Id. at 12.

The RLEA's claim would require us to invoke the mandatory bargaining provisions of the RLA. Because in the present circumstances these provisions are superseded by the ICA, we affirm the decision of the district court.

LAY, Chief Judge, dissenting.

I respectfully dissent. I cannot agree that the Interstate Commerce Act, 49 U.S.C. §§ 10101-11917 (1982) (ICA), was intended to supersede the mandatory bargaining requirements of the Railway Labor Act, 45 U.S.C. §§ 151-188 (1982) (RLA). I do not believe that Congress intended the ICA proceedings to be a means of providing labor security and protection which is inherent under the mandatory bargaining procedure of the RLA. The ICA focuses on national transportation policy. *See* 49 U.S.C. § 10101a. Although the interest of labor may be asserted in proceedings before the Interstate Commerce Commission (ICC), I agree with Third Circuit's view that it is highly unlikely "that Congress intended that rail labor look for its sole protection to an agency that lacks expertise in this field." *Railway Labor Executives' Ass'n v. Pittsburgh & Lake R.R.*, No. 87-3797, slip op. at 56 (3d Cir. Apr. 8, 1988). It is clear to me that the ICC lacks expertise in the field of labor security. I respectfully conclude that Congress did not intend to include labor protective conditions within the

ICC proceedings so as to supersede labor's protective mechanisms under the Railway Labor Act.

A true copy.
Attest:
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX I

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 87-1774

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL., PLAINTIFFS, APPELLANTS

v.

GUILFORD TRANSPORTATION INDUSTRIES, INC., ET AL., DEFENDANTS, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

[Hon. GENE CARTER, *U.S. District Judge*]

Before

CAMPBELL, *Chief Judge*,
TORRUELLA and SELYA, *Circuit Judges*.

John O'B. Clarke, Jr., with whom *Highsaw & Mahoney, P.C.*, *Craig J. Rancourt* and *Law Office of Craig J. Rancourt* were on brief for appellants.

Ralph J. Moore, Jr., with whom *D. Eugenia Langan*, *Jonathan T. Weinberg, Shea & Gardner*, *Charles S. Einsiedler, Jr.*, and *Pierce, Atwood, Scribner, Allen, Smith & Lancaster* were on brief for appellees.

January 20, 1988

Per Curiam. Counsel for appellants has conceded that the decision of this court in *Brotherhood of Locomotive Engineers* v. *Boston & Maine Corp.*, 788 F.2d 794 (1st Cir.), *cert. denied,* 107 S. Ct. 111 (1986), controls this appeal. We have consistently held in such circumstances that the error-correcting function (if any error there be) should ordinarily be reserved to court en banc, not seized by a successor panel. *See Lacy* v. *Gardino*, 791 F.2d 980, 985 (1st Cir.), *cert. denied,* 107 S. Ct. 284 (1986). We see no reason to depart from that prudential rule in this instance. Simply put such departure "demands special justification", *Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984), and there has been no such showing here. Contrary to appellant's argument, Justice Stevens' opinion in *ICC* v. *Brotherhood of Locomotive Engineers,* 107 S. Ct. 2360, 2370 (1987) (Stevens, J., concurring), casts no large shadow of doubt over our earlier decision in *Brotherhood of Locomotive Engineers* v. *Boston & Maine Corp., supra.* Nor have any compelling reasons been advanced which make us believe that reconsideration of our recent precedent should be undertaken or recommended by this panel.

Accordingly, we summarily affirm the district court's dismissal of this action on the basis of the panel opinion in *Brotherhood of Locomotive Engineers* v. *Boston & Maine Corp., supra. See* First Circuit Local Rule 34.1.

APPENDIX J

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Civil No. 87-0034-P

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.,
PLAINTIFFS

v.

GUILFORD TRANSPORTATION INDUSTRIES, INC., BOSTON AND MAINE CORPORATION, DELAWARE & HUDSON RAILWAY COMPANY, MAINE CENTRAL RAILROAD COMPANY, PORTLAND TERMINAL COMPANY, AND SPRINGFIELD TERMINAL COMPANY, DEFENDANTS

CARTER, District Judge

MEMORANDUM OF DECISION AND ORDER

Currently before the Court are the following motions: Plaintiffs' Motion for Reconsideration of the Court's Order of January 30, 1987; Defendants' Motions to Dismiss Complaint;[1] and Plaintiffs' Motion for Interlocutory Injunctive Relief. For the reasons discussed fully below, the Court finds that it lacks jurisdiction and dismisses the action.

[1] All defendants have joined in a Motion to Dismiss for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1), (6). Defendant Guilford Transportation Industries, Inc. (Guilford) has also filed a separate motion to dismiss. In its separate motion, Guilford argues that if the Court retains jurisdiction over the action, Guilford is not a proper party. Due to the Court's disposition of the action on jurisdictional grounds, the Court does not reach the issue raised in Guilford's separate motion.

Plaintiffs Railway Labor Executives' Association[2] have brought this action for declaratory judgment and injunctive relief against Defendants Guilford Transportation Industries, Inc. (Guilford), Boston and Maine Corporation (B&M), Delaware & Hudson Railway Company (D&H), Maine Central Railroad Company (MEC), Portland Terminal Company (PT), and Springfield Terminal Company (ST) in response to the pending implementation of a number of leases among the various Defendants.[3]

Plaintiffs allege that the present pattern of intracorporate leases is just yet another step in Defendants' "systematic and deliberate plan to effect without

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[2] Plaintiffs include the Railway Labor Executives' Association, the International Federation of Professional and Technical Engineers, and the following 14 member organizations of the Association: American Railway and Airway Supervisors Association (Division of BRAC); American Train Dispatchers Association; Brotherhood of Locomotive Engineers; Brotherhood of Maintenance of Way Employees; Brotherhood of Railroad Signalmen; Brotherhood Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes; Brotherhood Railway Carmen (Division of BRAC); International Association of Machinists and Aerospace Workers; International Brotherhood of Boilermakers and Blacksmiths, Iron Ship Builders, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical Workers; International Brotherhood of Firemen and Oilers; Railroad Yardmasters of America (Division of UTU); Sheet Metal Workers' International Association; and United Transportation Union.

[3] The leases challenged by this action include: leases between B&M and ST, Finance Docket Nos. 30791, 30925*, 30951,* 30955, 30966,* 30981,* 30993,* 31003, 31015; leases between MEC and ST, Finance Docket Nos. 30967,* 31002,* 31023; and leases between D&H and ST, Finance Docket Nos. 30965, 30972, 31003. The seven docket numbers marked with an asterisk represent leases that have been implemented.

bargaining the changes in rules and working conditions" which Defendants have heretofore failed to accomplish within the statutory requirements of the Railway Labor Act. Plaintiffs' Complaint for Declaratory Judgment and Injunctive Relief ¶ 13, at 5. *See Railway Labor Executives' Ass'n v. Boston & Maine Corp.*, No. 86-0273-P, slip op. at 2-3 n. 3 (D. Me. July 8, 1987) (citing cases detailing history of labor dispute between parties). Count I alleges that Defendants are or will be in violation of a 1982 order of the Interstate Commerce Commission (ICC), Finance Docket No. 29720 (Sub-No. 1), by implementing the leases. Count II alleges that Defendants have willfully and deliberately violated various sections of the Railway Labor Act, 45 U.S.C. §§ 151-163 (1982). Plaintiffs allege that the Court has jurisdiction under 28 U.S.C. §§ 1331, 1336(a), and 1337(a), and under 49 U.S.C. § 11705.

I.

The underlying facts are not, at this juncture, complex. In 1982, Guilford, which already owned MEC and its subsidiary PT, obtained the approval of the ICC under section 11343 of the Interstate Commerce Act, 49 U.S.C. § 11343 (1982) (the Act), to acquire control of both D&H and B&M, including B&M's subsidiary ST. *See* ICC Finance Docket Nos. 29720 (Sub-No. 1) and 29772 (the 1982 orders). These acquisitions resulted in the corporate affiliation of the Defendants now before the Court. As part of its approval, the ICC imposed arrangements for the protection of employee interests known as the *New York Dock*[4] conditions.

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[4] The *New York Dock* conditions were developed in *New York Dock Ry.–Control–Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979). These conditions are important to Plaintiffs because they require

Subsequent to the above acquisitions, Guilford sought and received notices of exemption by the ICC under section 10505 of the Act, 49 U.S.C. § 10505, which allow Guilford to implement the leases challenged by this action. *See, e.g.*, Finance Docket Nos. 30965, 30967. On December 30, 1986, MEC served a notice of the proposed lease transaction on the affected unions; the next day, Plaintiffs filed petitions with the ICC under the relevant dockets requesting that the ICC determine that the appropriate employee protective provisions are the *New York Dock* conditions imposed in the 1982 orders and not the *Mendocino Coast*[5] conditions usually imposed on exempt lease transactions. On January 14, 1987, the ICC released its decision acknowledging Plaintiffs' petitions and indicating that it would issue a subsequent decision on the issue raised therein. Finance Docket No. 30967. The parties still await the ICC's decision.[6] In the interim, Defendants are apparently re-

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that employees affected by any transaction receive at least 90 days advance notice and that an implementing agreement be negotiated between all parties to the transaction before the transaction is consummated.

[5] *Mendocino Coast* conditions were developed in *Mendocino Coast Ry., Inc.–Lease and Operate*, 354 I.C.C. 732 (1978), *as modified at* 360 I.C.C. 653 (1980), *aff'd sub nom. Railway Labor Executives' Ass'n v. United States*, 675 F.2d 1248 (1982). Under *Mendocino Coast*, employees affected by a transaction receive 20 days advance notice, and the transaction may be consummated before an implementing agreement is negotiated between the lessee and lessor railroads and the affected labor interests.

[6] On May 12, 1987, the ICC released another decision which also deferred resolution of the employee protection issue pending the receipt of additional evidence and further investigation. Finance Docket No. 30965 (also encompassing Finance Docket Nos. 30967, 30972, 30981, 30993, 31002, 31003).

quired to adhere to the *Mendocino Coast* conditions in the implementation of the MEC leases.

Plaintiff filed the present case in this Court on January 28, 1987; they sought a temporary restraining order on January 29, just two days prior to the February 1st effective date of the challenged MEC lease. On January 30th, the Court denied the motion for temporary relief and dismissed Count I of the Complaint for lack of subject matter jurisdiction or, in the alternative, declined jurisdiction as to Count I because the issue fell within the primary jurisdiction of the ICC. *Railway Labor Executives' Ass'n v. Guilford Transp. Indus.*, 653 F. Supp. 643, 645 (D. Me. 1987). The Court turns now to the arguments presented by the parties with respect to each count of the Complaint.

II. Count I

In seeking reconsideration of the Court's prior order, which dismissed Count I, Plaintiff's advance three separate requests. First, Plaintiffs ask the Court to retain jurisdiction of Count I. Second, Plaintiffs renew their request for injunctive relief pending the outcome of the ICC petitions. Finally, Plaintiffs ask that the Court stay further proceedings on Count I, including any referral of the determinative factual question to the ICC, until the ICC rules on Plaintiffs' petitions in the lease cases.

A. Jurisdiction

In pressing their original request for temporary relief, Plaintiffs did not address with specificity the issue of the Court's jurisdiction, nor did Defendants raise the issue in the brief time available for a response; neither party mentioned the doctrine of primary jurisdiction.

Because Count I sought enforcement of the 1982 orders,[7] the Court determined that Plaintiffs' right to relief depended on the resolution of the following factual question within the primary jurisdiction of the ICC: whether the challenged lease transactions fall within the scope of the 1982 orders. Because the question was pending before the agency, the Court also determined that it lacked subject matter jurisdiction. *Id.* Plaintiffs now expressly argue that under section 11705(a) of the Act[8] the Court has jurisdiction to enforce the 1982 orders and should retain jurisdiction while the ICC determines the above-stated predicate factual issue, a determination which Plaintiffs concede is within the

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[7] The enforcement powers of the Court derive from section 11705 of the Interstate Commerce Act, which provides in part:

> (a) A person injured because a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title does not obey an order of the Commision, except an order for the payment of money, may bring a civil action to enforce that order under this subsection.
>
> . . . .
>
> (b)(2) A common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I or III of chapter 105 of this title is liable for damages sustained by a person as a result of an act or omission of that carrier in violation of this subtitle.
>
> . . . .
>
> (c)(1) A person may file a compaint with the Commission under section 11701(b) of this title or bring a civil action under subsection (b)(1) or (2) of this section to enforce liability against a common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I or III of chapter 105 of this title. . . .

49 U.S.C. § 11705(a), (b)(2), (c)(1) (1982).

[8] *See supra* note 7.

primary jurisdiction of the ICC. Defendants counter that the Court's dismissal of the action is appropriate under the guidelines articulated in *Far East Conference v. United States*, 342 U.S. 570 (1952). Having now had the benefit of full briefing on the issue, particularly Plaintiffs' position regarding the referral option, the Court determines that no purpose would be served by retaining jurisdiction and therefore reaffirms its prior dismissal of Count I, clarifying any ambiguity that may have arisen from its prior discussion of referral.

The Court's reasoning rests on the unique relationship between the case pending before it and the several petitions pending before the ICC. Plaintiffs made an initial strategic choice to pursue their challenges to the present leases in the context of the exemption notices before the ICC. The alternative would have been to initiate an enforcement action of the 1982 orders, either by filing an action in this Court under section 11705(a) or by seeking a declaratory order from the ICC under section 11701, 49 U.S.C. § 11701(b). Plaintiffs chose to proceed in the exemption context because they perceived that their petitions would afford them the most immediate relief.[9] In their petitions before the ICC, Plaintiffs expressly raised the argument that the leases are transactions within the meaning of the 1982 orders. *See, e.g.*, Finance Docket No. 30967, 52 Fed. Reg. 2625 (1987). When, however, the ICC deferred its decision as to whether "the *New York Dock* conditions should also

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[9] *See* Plaintiffs' Memorandum in Support of Motion for Reconsideration at 7: "[I]f the Commission did not impose the *New York Dock* conditions in the lease cases, the notice and negotiation protections [provided by *New York Dock*] would be lost while the applicability of those conditions to the lease transactions was litigated."

apply to this lease transaction, because it is allegedly just another transaction to further the control benefits attributable to the original acquisition of MEC by [Guilford]"), *id.*, Plaintiffs raised the same issue in the present enforcement action in this Court.

In issuing the January 30 Order, the Court expressed its concerns about ruling on an issue currently pending before the ICC. One concern is, of course, that the ICC action may moot the issue before this Court. This possibility may, however, be easily addressed by the Court staying any action until the ICC rules. Nevertheless, another concern counterbalances the wisdom of issuing a stay: if Plaintiffs have a right to have their claim resolved by this Court, the Court should not avoid its duty to render the appropriate relief. This concern may counsel immediate referral to the ICC of the determinative factual question, directing the ICC to address the issue and thus preserving Plaintiffs' rights.[10] But as the briefing has expanded in this case, it is now apparent that the Court's initial concern about its jurisdiction provides the most significant justification for allowing the ICC to act first on all issues.

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[10] It is possible that the ICC may resolve the issues pending before it without reaching the factual question presented by Count I. The Court notes that in a recent unpublished opinion, the ICC indicated that it was deferring the resolution of the appropriate level of employee protection for the challenged leases both in light of the status of these transactions under the 1982 orders and in light of independent factual issues such as the number of similar leases which exist in the Guilford corporate structure, whether these leases have a cumulative effect different from that which usually occurs in lease transactions, whether Guilford plans to initiate other leases in the near future, and the impact of the leases on Defendants' employees including a consideration of the manner in which Guilford is implementing the leases. Finance Docket No. 30965 (May 12, 1987), Plaintiffs' App. C.

By bringing an enforcement action in this Court while the same issue is pending before the ICC in actions involving essentially the same relief, it appears to the Court that Plaintiffs have made a creative attempt to avoid the requirement of section 11705 that they make an election between the forums provided by the ICC and by this Court. *See, e.g., Louisville & N.R.R. v. Ohio Valley Tie Co.*, 242 U.S. 288, 291 (1916) (requiring claimant to elect between a complaint to the Commission and a civil action; decided under former 49 U.S.C. § 9). Plaintiffs' reluctance to have the issue referred to the ICC for determination highlights the problems created by their attempt to have both forums remain the forum of first instance.

Plaintiffs have requested that the Court, if it were to retain jurisdiction, "not refer [the determinative] issue to the ICC at this time." Plaintiffs' Memorandum in Support of Motion for Reconsideration at 7. Plaintiffs' request rises from their desire to avoid jurisdictional conflicts between this Court and the court of appeals, for this Court would retain jurisdiction over the referred question while the court of appeals would have jurisdiction over any results flowing from the petitions before the ICC. 28 U.S.C. § 1336(b), 2321(a), and 2341.[11] In the Court's view, it is precisely this type of conflict that is

[11] Plaintiffs have also argued, however, that if the ICC decides, in the context of the pending petitions, that the challenged leases fall within the 1982 orders, Plaintiffs will ask the Court to enforce the 1982 orders on the basis of the new decision. In effect, Plaintiffs would have an enforcement action pending in this Court while the determinative questions are being resolved in a separate action before the ICC. It appears to the Court, however, that any enforcement action would flow from the new ICC orders. Although this issue is not squarely before the Court at this juncture, it does highlight the difficulties raised by the Plaintiffs' invocation of multiple forums.

avoided by the election requirement of section 11705. Having initiated their fight before the ICC, Plaintiffs cannot in fairness avoid having the ICC remain the battlefield for all other initial skirmishes. If, as a result of the Court's dismissal of Count I, Plaintiffs are required to bring an original action before the ICC, the potential jurisdiction conflicts may be avoided, and Plaintiffs will have an opportunity to have their rights fully vindicated. Thus, even if the statute did not require an election between forums, the avoidance of forum shopping and the difficulties that overlapping forums present in light of the overall statutory scheme justify dimissal in this case. *See Montgomery Environmental Coalition v. Washington Suburban Sanitary Comm'n*, 607 F.2d 378, 382-83 (D.C. Cir. 1979) (finding dismissal proper where retention of jurisdiction by district court would conflict with appellate's review by action by EPA).

Finally, even if the duplicity of forums were not determinative of the issue, Plaintiffs have not demonstrated that dismissal would be improper. In deciding whether to stay the action pending referral or to dismiss, the Court must determine whether dismissal will prejudice any party. *United States v. Michigan Nat'l Corp.*, 419 U.S. 1, 4-5 (1974); *Far East Conf.*, 342 U.S. at 577. Plaintiff's advance two arguments in support of the Court's continued jurisdiction: one, Plaintiffs' concurrent request for injunctive relief bars dismissal; and two, Count I is inextricably tied to Count II. The Court addresses each in turn.

B. Request for Injunctive Relief

Plaintiffs' first argument is curious for Plaintiffs do not argue that they could not receive the same injunctive relief in an action before the ICC. More impor-

tantly, it appears from the record that Plaintiffs have requested this relief from the ICC in at least some of their petitions in the lease exemption notices. *E.g.*, Finance Docket No. 30965, at 2 n. 2 (May 12, 1987). The III has specifically rejected Plaintiffs' argument that they would be irreparably harmed if the lease transactions were consummated before the issue of employee protection conditions is decided. The ICC noted that even under the *Mendocino Coast* conditions, employees have a complete remedy at law to be "made whole" if the implementations proceed before the implementing agreements are negotiated. *Id.* Having had this issue resolved against them in the administrative context. Plaintiffs may not now come to this Court and argue that jurisdiction must be retained so that they might ask the Court for identical relief.

C. The Relationship of Count I to Count II

Plaintiffs' second argument centers on their allegation that some unspecified prejudice may result from the dismissal of Count I while Count II is pending before the Court. Because the Court finds, *see infra* Part III, that it also lacks jurisdiction over Count II, Plaintiffs' argument must fail on this ground.

The parties have not raised any additional claim of prejudice. Since it does not appear to the Court that there is any impediment to the Plaintiffs' initiating before the ICC the request for relief encompassed by Count I, if Plaintiffs have not already done so in their pending petitions, the Court finds that dismissal for want of jurisdiction is proper.

III. Count II

In Count II of their Complaint, Plaintiffs allege that Defendants have violated various sections of the Railway Labor Act (RLA) by implementing the challenged leases. The allegation rests on three grounds: one, because the leases affect existing rates of pay, rules and working conditions, Defendants must bargain with Plaintiffs over these changes within the procedures provided by the RLA; two, in various agreements among the parties, Defendants have bargained away their right to lease their properties[12]; and three, Defendants, have interfered with the rights of their employees to be represented by the labor organization of the employees' choice by communicating directly with their employees regarding the employment options under the leases.

Defendants argue that, regardless of whether Plaintiffs' allegations state a claim under the RLA, any RLA claim is preempted by the exemption found in section 11341(a) of the Act, 49 U.S.C. § 11341(a).[13] Plaintiffs

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[12] Paragraph 30 of the Plaintiffs' Complaint alleges that various agreements and practices between the parties prohibit Defendants from transferring work which is being performed by their employees to others without prior notice and negotiation. Because the motion before the Court is a motion to dismiss, the Court is required to construe the Complaint in the light most favorable to Plaintiffs, *see* 5 C. Wright & A. Miller, *Federal Practice & Procedure* § 1357, at 594 (1969), and therefore construes the above allegation as encompassing the argument advanced by Plaintiffs. By construing the Complaint liberally in favor of Plaintiffs, the Court does not imply any position regarding whether this construction of the allegation is supported by the as yet undeveloped facts of this case.

[13] Section 11341 provides in pertinent part:

> The authority of the Interstate Commerce Commission under this subchapter is exclusive. A carrier or corporation

have countered Defendant's argument by presenting the Court ith a comprehensive analysis of the controlling statutory provisions and their legislative history. Were the Court writing on a clean slate, Plaintiffs' arguments would need to be commented upon in depth. Here, however, the Court finds that its decision is controlled by *Brotherhood of Locomotive Engineers v. Boston & Maine Corp.*, 788 F.2d 794 (1st Cir.), *cert. denied*, 107 S. Ct. 111 (1986).

In *Boston & Maine*, the First Circuit considered whether section 11341 of the Act precluded a party who was adversely affected by the implementation of a section 10505-exempted lease from pursuing claims that would otherwise fall within the jurisdiction of the federal courts under the RLA. *Id.* at 796-99. The Circuit held that the exemption provided by section 11341 relieves the participants from *any* legal obstacles that would impede the transaction. *Id.* at 800.

Plaintiffs have attempted to distinguish their claims from the *Boston & Maine* case by emphasizing the following three sets of facts: one, that in *Boston & Maine*, the ICC had specifically considered the effect of the lease on the parties' rights in the underlying exemp-

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> participating in or resulting from a transaction approved by or exempted by the Commission under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises through the transaction without the approval of a State authority. A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. . . .

49 U.S.C. § 11341(a) (1982).

tion proceeding, where here Plaintiffs have raised these issues before the Court; two, the present case includes an allegation that Defendants had no right to enter the leases; and three, even under the section 11341 exemption, Defendants have no right to deal directly with their employees regarding the ICC-imposed employee protection conditions. The Court, however, finds *Boston & Maine* to be equally applicable to the present case and thus controlling precedent.

First, in formulating the relevant employee protection conditions to be applied to the challenged leases, the ICC is currently contemplating the effect of the leases on the collective bargaining rights of Defendants' employees. *See* Finance Docket No. 30965 (May 12, 1987) (unpublished). Plaintiffs' first argument thus loses much of its force in light of the ICC's contemporaneous consideration of this issue and the discretion vested in the ICC to "require the carrier to provide a fair arrangement" to employees whose interests are affected by the exempted transaction. 49 U.S.C. § 11347.

Second, the law of this Circuit is that Congress has expressly provided, through its enactment of section 11341, that transactions deemed to be in the public interest by the ICC override the rights and duties created by Congress in the RLA. Although Plaintiffs lose whatever their rights would be under the RLA, Plaintiffs have not lost all for they have a remedy – and are in fact concurrently pursuing it – compensation for the loss of their RLA rights. This remedy is provided by the ICC. Therefore, the forum for raising these arguments is the forum provided by that agency.

Finally, the breadth of the exemption contained in section 11347 [*sic*] also vitiates whatever force the remaining factual distinctions raised by Plaintiffs may have. Consequently, in accordance with the ruling of the

First Circuit, the Court finds that it is without jurisdiction to consider claims ordinarily cognizable by this Court under the RLA where the alleged claims arise directly out of a lease transaction granted a statutory exemption by the ICC under the controlling statute. *Cf. Maine Cent. R.R. v. Brotherhood of Maintenance of Way Employees*, 652 F. Supp. 40, 42 (D. Me. 1986) (finding that dispute concerning job protection benefits did not arise directly out of transaction approved by the ICC).

IV.

Over the course of this labor dispute, the parties have been repeatedly successful in invoking the jurisdiction of this Court to enforce the mandates of the RLA. Defendants' goal in these proceedings has not been hidden; they have sought and continue to seek a streamlined work force and the implementation of their conception of a cost-efficient labor agreement. Defendants' efforts, however, have been remarkably unsuccessful, due in part to their failure to reach a meaningful agreement with the unions involved and in part to the almost interminable procedures of the RLA, procedures which have been upheld by various decisions of this Court and which have been supplemented by various actions of both Congress and the President. Nevertheless, Defendants have now apparently discovered an alternate method to achieve a similar goal. Although the Court has examined the record presented in this case and has considered with care the arguments raised by Plaintiffs, the Court finds that Plaintiffs have presented their request for relief to the wrong forum. The relief they request is available only from the ICC and not from this

Court. Accordingly, the Court hereby *GRANTS* Defendants' Motion to Dismiss and *DENIES* Plaintiffs' Motion for Reconsideration, Injunctive Relief, and Stay.

So *ORDERED.*

/s/ Gene Carter
GENE CARTER
United States District Judge

Dated at Portland, Maine this 27th day of July, 1987.

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RAILWAY LABOR EXECUTIVE ASSOCIATION, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR REVIEW

The Railway Labor Executives' Association ("RLEA") hereby petitions the Court for review of a decision of the Interstate Commerce Commission ("the Commission") in *Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company–Control–Missouri-Kansas-Texas Railroad Company, et al.*, Finance Docket No. 30800, *et al.* which was entered on May 19, 1988. In that decision the Commission determined that it "had exclusive and plenary jurisdiction over railroad consolidations, including the effects on labor arising from such transactions." Decision at p. 82. The Commission stated that this jurisdiction was derived, in part, from the Commission's authority to exempt transactions from all other laws as necessary for the carrier to carry out the transaction. 49 U.S.C. § 11341. A copy of that decision is attached to this Petition.

Petitioner submits that the Commission's decision exceeds the Commission's statutory authority. The deci-

sion is erroneous as a matter of law and petitioner requests that the decision and order be vacated. RLEA is an unincorporated association that maintains its headquarters in this judicial Circuit thus, venue is proper in this Circuit. 28 U.S.C. § 2343.

Respectfully submitted,

/s/ JOHN O'B. CLARKE, JR.

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Attorneys for Railway Labor
Executives Association

Dated: May 27, 1988

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served copies of the foregoing Petition For Review with attached Interstate Commerce Commission order by first class mail, prepaid and properly addressed to:

Edwin Meese, III
Attorney General
Department of Justice
Constitution Avenue, N.W.
between 9th & 10th Streets
Washington, D.C. 20530

Robert S. Burk
General Counsel
Interstate Commerce Commission
12th Street and Constitution Avenue, N.W.
Washington, D.C. 20423

and caused to be served copies of the foregoing Petition For Review without an attached Interstate Commerce Commission order by first class mail, prepaid and properly addressed to all other parties of record in this proceeding.

Dated at Washington, D.C. this 27th day of May, 1988.

/s/ DONALD F. GRIFFIN
Donald F. Griffin

LABOR

Pursuant to the requirements of 49 U.S.C. 11347 and 11344(b)(4), we have considered the effect of the proposed transaction on the interests of carrier employees. Subject to the conditions discussed below, we find the transaction consistent with the public interest as it concerns carrier employees.

Applicants estimate that as a result of consolidation, out of a workforce of 38,800 persons, 1,124 positions will be eliminated, 4 positions will be created, and 622 positions will be transferred. The unions argue that applicants' analysis of employee impact is erroneous. They also argue that it does not reflect additional numbers of employees who may be adversely affected in the future as management determines further changes that could lead to increased efficiency.

We recognize the difficulty of estimating with certainty the number of employees or positions that will be affected by a consolidation. The unions themselves acknowledge this problem. We also recognize, as do the unions, that most of these changes lead to increased efficiency, a goal to be encouraged. Applicants' estimates are reasonable, and the protections we mandate are available to adversely affected employees, whether or not their positions were anticipated by applicants to be affected.

The minimum protection afforded employees affected by a consolidation, absent voluntary agreement, is set out in *New York Dock Ry.–Control–Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979) (*New York Dock*). These protections include mandated 90-day notice of employment actions; negotiated employment actions; implementation of employment changes resulting from a consolidation with compulsory arbitration of disputes; compensa-

tion of dismissed employees and differential compensation of displaced employees, at the rate of their last year of employment, for 6 years after impact (or for their period of employment if less than 6 years); reimbursement of moving expenses; and protection against loss from the sale of a home. We may tailor employee protective conditions to the special circumstances present in a particular case. This is done, however, only if it has been shown that unusual circumstances require more stringent protection than the level mandated at 49 U.S.C. 11347. *Railroad Consolidation Procedures*, 363 I.C.C. 784, 793 (1981).

The unions seek modification to the *New York Dock* conditions, allegedly to take into account the magnitude and extent over time of the alteration in the work forces of the merging carriers. The first significant change proposed involves the inclusion of a 10-year presumption of effect from the date of approval of this merger on displaced, dismissed or otherwise affected employees. The second requests the inclusion of a calculation of displacement or dismissal allowance for employees with less than 1 year of service. The third requests a modification of the dismissal allowance provisions to allow for the suspension of benefits in specific circumstances. The fourth requests that the displacement and dismissal allowance calculations be modified to eliminate certain test period months. They also ask that protection be afforded to non-applicant railroad employees.

We find that the statutory protections provided in *New York Dock* are appropriate to protect employees affected by this transaction. These protections have been held to satisfy the statutory requirements of 49 U.S.C. 11347, *New York Dock Railway* v. *United States*, 609 F.2d 83 (2d Cir. 1979), and no unusual circumstances

have been shown in this case to justify additional protection. We stated, in *Railroad Consolidation Procedures*, 363 I.C.C. 784, 793 (1981), that unless it can be shown that because of unusual circumstances more stringent protection is necessary, we will provide the protections mandated by 49 U.S.C. 11347. We have rejected the modifications proposed herein in prior consolidation proceedings. *See Norfolk Southern*, 366 I.C.C. 171, at 231 (1982); *UP-Control*, 366 I.C.C. 459 at 620-621 (1982); *CSX*, 363 I.C.C. at 590; Finance Docket No. 28905 (Sub-No. 1), *CSX Corp.–Control–Chessie and Seaboard C.L.I.* (not printed), served October 16, 1981; *BN Frisco*, 360 I.C.C. 784, 946 (1980); and *Norfolk & Western Ry. Co.–Pur.–Illinois Term. R. Co.*, 363 I.C.C. 882, 888-90 (1981). We once again reject those arguments for the reasons set forth in those cases. We find no unusual circumstances in this proceeding requiring imposition of conditions in excess of the statutory minimum. We will impose the conditions specified in *Oregon Short Line R. Co.–Abandonment–Goshen*, 360 I.C.C. 91 (1979) in applicants' related abandonment proceedings. The conditions specified in *Norfolk and Western Ry. Co.–Trackage Rights–BN*, 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Ry., Inc.–Lease and Operate*, 360 I.C.C. 653, 664 (1980), will be imposed on the approved trackage rights. The *Oregon Short Line* and *Mendocino* conditions are similar to the *New York Dock* conditions, but are applied in the context of abandonment or trackage rights proceedings. The imposition of these conditions here is a matter of consistency but has little practical significance, because all affected employees will also be covered by the *New York Dock* conditions imposed on the primary transaction.

We have in the past rejected BLE's request for extension of employee protective conditions to employees of

nonapplicant roads. See *Burlington Northern, Inc.–Control & Merger–St. L.*, 360 I.C.C. 784, 948-950 (1980); *UP Control*, 366 I.C.C. 459 at 621 (1982). For reasons explained there we also deny the request here.

The unions also argue that employees of applicants' motor carrier subsidiaries should be protected as if they were railroad employees, and that the Commission does not have the authority to exempt the transaction from the Railway Labor Act.

As to the first contention, employees of non-rail affiliates of railroads are not required by statute to be protected from the effects of rail mergers. The statute, formerly section 5(2) of the Interstate Commerce Act, required only that the interests of *railroad* employees be protected. The 1978 recodification of the Act, while eliminating the specific reference to railroad employees, 49 U.S.C. 11347, may not be read to change substantively the law it replaced, Pub. L. No. 95-473, § 3(a), 92 Stat. 1337, 1466 (1978). Thus, labor protection may only be imposed for motor carrier employees on a discretionary basis. 49 U.S.C. 11344(c). No justification has been presented to exercise our discretion. No demonstrations of need has been made. *See Norfolk Southern Corp.–Control–North American Van Lines*, 1 I.C.C.2d 844, 877 (1985), *rev'd. on other grounds sub nom. International Brotherhood of Teamsters* v. *ICC*, 801 F.2d 143 (D.C. Cir. 1986), *decision below aff'd. on rehearing*, 818 F.2d 87 (D.C. Cir. 1987). Truckers generally do not have limited skills, as do rail employees, but can more easily find employment throughout the motor carrier industry. *See Chicago, M., St. P.&P. R.R.–Reorganization–Acquisition by Grand Trunk Corp.*, 2 I.C.C.2d 427, 443 (1985). Consequently, we will deny the request to impose labor protection for employees of applicants' motor carrier subsidiaries.

Finally, the unions argue that the Commission does not have the authority to exempt this transaction from the Railway Labor Act and collective bargaining agreements. We disagree. The Commission has exclusive and plenary jurisdiction over railroad consolidations, including the effects on labor arising from such transactions. This authority is based on several legal grounds. One source of this authority is section 11341(a) of the Interstate Commerce Act, 49 U.S.C. 11341(a), which provides that the Commission's authority over combinations is exclusive, and that "[an] approved or exempted transaction is exempt from the antitrust laws and from all other law . . . as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction." Section 11341(a) enables the Commission to ensure the implementation of approved transactions and the realization of their benefits. *See Missouri Pacific R.R.* v. *UTU*, 782 F.2d 107 (8th Cir. 1986), *cert. denied*, 107 S.Ct. 3209 (1987). (Section 11341(a) exempts Commission-approved mergers from the Railway Labor Act). The self-effecting exemption enables the carriers to implement not only the legal and financial, but also the operational aspects of the transaction upon consummation, without the need to apply to courts or labor unions (except as required under the labor conditions we impose) for authority to do so. Any other result would render the exemption, as well as Commission approval of a transaction, meaningless. We see no reason to speculate on the practical effects of exclusive Commission jurisdiction in this transaction, since the parties will have the opportunity to resolve differences through negotiation and arbitration or seeking further guidance from us on specific problems.

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